Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-259

R. L. GARDNER and RUTH GARDNER - - Petitioners

versus

THE NASHVILLE HOUSING AUTHORITY OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE;
JACK D. HERRINGTON, Secretary and Executive Director;
VANDERBILT UNIVERSITY; and
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT - - Respondents

---

CHARLES H. ADAIR and JUNE P. ADAIR - - Petitioners

versus

THE NASHVILLE HOUSING AUTHORITY OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE;
JACK D. HERRINGTON, Secretary and Executive Director;
VANDERBILT UNIVERSITY; and
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT - - Respondents

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled consolidated cases (its case numbers 74-1687 and 74-1688) on April 10, 1975. A motion for rehearing was denied by order dated June 18, 1975.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit is unreported and is printed in the Appendix hereto, *infra,* pages 85-89. The opinion of the United States District Court for the Middle District of Tennessee is printed in the Appendix hereto, *infra,* pages 66-83. The order of the United States District Court for the Middle District of Tennessee pursuant to that opinion is printed in the Appendix hereto, *infra,* page 84.

A prior opinion and order in the same consolidated cases of the Circuit Court of Appeals for the Sixth Circuit is unreported and is printed in the Appendix hereto, *infra,* pages 63-65. The opinion of the United States District Court for the Middle District of Tennessee from which the first appeal was taken is unreported and is printed in the Appendix hereto, *infra,* pages 25-62. The order entered by the District Court pursuant to that opinion is printed in the Appendix hereto, *infra,* page 62. The order Denying Petition for Rehearing is printed in the Appendix hereto, *infra,* pages 90-91.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 10, 1975. The order overruling a motion for rehearing was entered June 18, 1975. The jurisdiction of the court is invoked under 28 USC, Sec. 1254(1).

QUESTIONS PRESENTED

I. Whether it is necessary to prove by *overt* actions that a conflict of interest exists before the actions of an Administrative Board are void if the facts are that in an Urban Renewal project two members of the Nashville Housing Authority are officers and stockholders of certain banks, those banks own property within the project area and the officers' superiors, who also own stock in the banks, are members of the Board of Trust of Vanderbilt University which is profiting from the project and must contract with the Nashville Housing Authority; and the engineers who declare that the project area was an eligible project were employees of both the Nashville Housing Authority and the Vanderbilt University?

II. Whether the action of a housing authority is valid in declaring an area to be slum and blighted even though the members of the commission are not aware of the findings and admittedly did not understand the standards used to declare a project area slum and blighted and every house contained a workable plumbing, heating and electrical system?

III. What is, constitutionally, a "fair and meaningful hearing" under the due process clause of the Constitution before an Administrative Agency and what type of "fair and meaningful hearing" is required by 42 USCA, Sec. 1453(d)?

IV. Whether 42 USCA, Sec. 1463, is unconstitutional as violative of the due process clause of the Fourteenth Amendment *in its application to this project and these petitioners,* where the property is taken primarily for the private use and benefit of Vanderbilt University and only incidentally for a public use?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

UNITED STATES CODE

42 USCA Sec. 1455(d):

> "(d) No land for any project to be assisted under this subchapter shall be acquired by the local public agency except after public hearing following notice of the date, time, place, and purpose of such hearing."

42 USCA Sec. 1463(a):

> "(a) In any case where an educational institution or a hospital is located in or near an urban renewal

project area and the governing body of the locality determines that, in addition to the elimination of slums and blight from such area, the undertaking of an urban renewal project in such area will further promote the public welfare and the proper development of the community (1) by making land in such area available for disposition, for uses in accordance with the urban renewal plan, to such educational institution or hospital for redevelopment in accordance with the use or uses specified in the urban renewal plan, (2) by providing, through the redevelopment of the area in accordance with the urban renewal plan, a cohesive neighborhood environment compatible with the functions and needs of such educational institution or hospital, or (3) by any combination of the foregoing, the Secretary is authorized to extend financial assistance under this subchapter for an urban renewal project in such area without regard to the requirements in section 1460 of this title with respect to the predominantly residential character or predominantly residential re-use of urban renewal areas. The aggregate expenditures made by any such institution or hospital (directly or through a private redevelopment corporation or municipal or other public corporation) for the acquisition within, adjacent to, or in the immediate vicinity of the project area, of land, buildings, and structures to be redeveloped or rehabilitated by such institution for educational uses or by such hospital for hospital uses in accordance with the urban renewal plan (or with a development plan proposed by such institution, hospital, or corporation, found acceptable by the Secretary after considering the standards specified in section 1460 (b) of this title, and

approved under state or local law after public hearing) and for the demolition of such buildings and structures if, pursuant to such urban renewal or development plan, the land is to be cleared and redeveloped, and for the relocation of occupants from buildings and structures to be demolished or rehabilitated, as certified by such institution or hospital to the local public agency and approved by the Secretary, shall be a local grant-in-aid in connection with such urban renewal project; *Provided,* That no such expenditure shall be eligible as a local grant-in-aid in any case where the property involved is acquired by such educational institution or hospital from a local public agency which, in connection with its acquisition or disposition of such property, has received, or contracted to receive, a capital grant pursuant to this subchapter: *Provided further,* That no such expenditure shall be deemed ineligible as a local grant-in-aid in connection with an urban renewal project, to the extent that the expenditure is otherwise eligible, if the facilities, land, buildings, or structures with respect to which the expenditure is made are located within one mile of the project."

Tennessee Code Annotated, Sec. 13-813:

"13-813. Blighted areas defined.—Blighted areas are areas (including slum areas) with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use, or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community."

Tennessee Code Annotated, Sec. 13-910:

"13-910. *Interest of commissioners or employees in contracts—Misconduct.*—No commissioner or employee of an authority shall acquire any interest direct or indirect in any housing project or in any property included or planned to be included in any project, nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any housing to be furnished or used in connection with any housing projects. If any commissioner or employee of an authority owns or controls an interest direct or indirect in any property included or planned to be included in any housing project, he shall immediately disclose the same in writing to the authority and such disclosure shall be entered upon the minutes of the authority. Failure to so disclose such interest shall constitute misconduct in office."

STATEMENT

Each of the petitioners was a long time resident and property owner in the Vanderbilt Urban Renewal area of Nashville, Tennessee (which, according to doctors of philosophy, psychology and sociology who testified was the best and most viable residential area in Nashville), sought to enjoin threatened condemnation of their homes in the United States District Court at Nashville.

The area involved for condemnation was exactly the area needed by Vanderbilt University for expansion, as determined by the engineering firm of Clarke

and Rapauno as engineers for Vanderbilt University who also, as engineers for the Nashville Housing Authority, conducted the surveys showing the area was slum and blighted.

The Urban Renewal Project was for the direct financial benefit of Vanderbilt University which agreed to pay the purchase price for all the land within the area to be condemned. The Nashville Housing Authority members that judged the area to be slum and blighted were not even conversant with the standards used by HUD and the firm of Clarke and Rapauno at the time of the trial and at the time of the finding that the area was slum and blighted. The members were not even conversant with the project plan and stated they relied solely on the recommendation of the engineering firm that was employed at the same time by both Vanderbilt University and Nashville Housing Authority.

Two members of the Nashville Housing Authority were officers of two banks, the chief executive officer of each of which was a member of the Vanderbilt Board of Trust and each of the Housing Authority members and their superiors owned stock in the employing banks. Both banks stood to gain through bond issues and deposits from the project and owned property in the area.

The director of Urban Renewal for Nashville Housing Authority was a Vanderbilt graduate; the HUD representative that approved the project was a Vanderbilt graduate; and the Assistant Urban Renewal Director who coordinated the work was a Vanderbilt graduate. The Chancellor of Vanderbilt University was a director of the Federal Reserve Branch at Atlanta that exercised control over the two banks involved. The engineering firm of Clarke and Rapauno, which had been employed by both Vanderbilt and NHA, stood to gain financially if the project was approved.

At the required public hearing, a different definition of substandard was given to the public than was used by the engineers of HUD. The plan was filed only a few days before the public hearing and the administrator of HUD testified that the finding of Nashville Housing Authority was based on survey sheets, which the Nashville Housing Authority refused to give to the land owners until after approval of the project. These survey sheets showed that both banks owned property in the Urban Renewal area and, upon trial in the District Court, the evidence was so abundant in establishing the inaccuracy and the obsolescense of the surveys as to destroy their integrity.

The public hearing consisted of each protestant being allowed to speak for five minutes and no opportunity of cross-examination of the proponents or the presentation of evidence. Upon trial in District Court, the HUD official agreed that no intelligent protest could be made without access to the survey sheets, which had been denied to the property owners, and that with the short period of time involved, even with the survey sheets, protestants did not have sufficient time to adequately prepare for the hearing. The only legal

adviser at the public hearing was the attorney for Vanderbilt University.

Petitioners sought to enjoin threatened condemnation.

REASON FOR GRANTING WRIT

The questions above present serious problems and extremely important questions in the field of eminent domain concerning which this Court has either not made a definitive ruling or in which there is an apparent conflict between decisions of the Circuit Courts of Appeal.

It has been more than twenty years since this Court's decision in *Berman* v. *Parker,* 348 U. S. 26, 99 L. Ed. 27 (1954), which was rendered only a relatively short time after the urban renewal concept came into implementation. This Court has for the most part been silent on many questions which have arisen in the federal courts under the urban renewal laws.

Berman answered certain basic urban renewal eminent domain questions but the questions which that case did not call upon the Court to decide and the questions which have arisen from the decision itself in the are of property rights require consideration by this Court and elaboration of the meaning of this constitutional guarantee as it is affected by the urban renewal laws.

This case presents some of these questions.

One example of the problems which property owners have in urban renewal cases is that this record

shows a HUD official testified that under present regulations there was no way for a property owner to make any effective protest of the taking of his property.

In short, it is imperative that this Court declare, first, whether there is to be in reality *any* limitation upon the powers of local urban renewal agencies and upon HUD and, secondly, if this power is not to be absolute, what the limitations are.

ARGUMENTS SUPPORTING REASONS FOR GRANTING WRIT

Question I

Under the Administrative Procedures Act, the Tennessee Code Annotated and the common law, public officials are prohibited from interest in projects or matters within their jurisdiction, and this Court needs to clarify the law relative to conflict of interests by public officials. The different Federal Courts of Appeal and State Courts have various decisions and the term needs to be succinctly and adequately defined by this Court. This question has not been decided in this Court previously.

State statutes like the Tennessee Statute (TCA 13-910), which prohibits any commissioner from having any interest, either direct or indirect, in any project or in any property included in the project, are declaratory of the common law. 10 McQuillen, Municipal Corporations, Sec. 29.99, p. 483.

The federal courts held, even prior to adoption of the Administrative Procedures Act (which contains a

provision to guard against bias and partiality, or even the suspicion of it, in the part of administrative officers with decision making powers), that administrative officials were subject to a rule closely akin to that applicable to Judges when the question of possible bias or conflict of interest by administrative officers arose. In *Berkshire Employees Assn.* v. *NLRB,* 3rd Cir. 1941, 121 F. 2d 235, the court stated at page 238:

> ". . . One of these essentials is the resolution of contested questions by an impartial and disinterested tribunal. These adjectives are not absolute but relative as every thoughtful person knows. Decisions affecting human beings, made by human beings, necessarily are colored by the sum total of the thoughts and emotions of those responsible for the decision . . ."

The court rejected the argument that the evidence showed only one member of the NLRB was not in a position to judge the case impartially, stating:

> ". . . We deem this answer insufficient. Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."

Following adoption of the Administrative Procedure Act, the federal courts continued to rely not only the act but upon the inherent right of a person affected by such decision to have a fair hearing by one having no interest and no potential interest, direct or indirect,

in the result of the decision. This has been referred to as "Procedural Due Process" to a degree that any such interest or potential interest would void the proceedings. See, for example, *Amos Treat and Co.* v. *SEC.* CADC, 1962, 306 F. 2d 260 at page 265, where the court said:

> ". . . It is not enough that here no corruption has been charged, indeed appellants expressly disclaim personal bias and prejudice. What must control is the policy this court has previously applied and the principles, discernible from the cases and from the statute, that the investigative as well as the prosecuting arm of the agency must be kept separate from the decisional function."

The court accordingly concluded "Solely on due process grounds" that the appellants' claim should be heard.

Yet the Court of Appeals in the case at bar held in effect that overt acts of conflict of interest must be proved before actions of an administratvie agency would be set aside by the courts. This position clearly rejects the universally recognized principle that it is not necessary that the advantage be a personal financial one or that there be a showing that the particular official sought or gained such an advantage. It also effectively repeals the statutory and common law prohibition against any indirect interest.

Wilson v. *Iowa City* (Iowa 1965), 165 N. W. 2d 1813, a state court urban renewal case involving a university, enunciates the applicable conflict of interest

principles but was distinguished by the Court of Appeals when it was not distinguishable. The opinion attempts to make a distinction when there is no difference and terms as dicta in the Iowa opinion that which is not dicta. Other states adhere to the Iowa rule (cf. *Josephson* v. *Planning Board of Stanford* (Conn. 1964), 199 A. 2d 690, 10 ACR 3d 687, and *Griggs* v. *Borough of Princeton* (New Jersey), 162 A. 2d 862).

It is the potential for conflict which the law prohibits. Since the potential was manifest here the Court of Appeals of necessity rejected the principle, particularly in the light of the affected commissioners' total ignorance of standards to be applied in urban renewal projects.

Question II

The Court of Appeals dismissed the petitioner's contention that the action of the Nashville Housing Authority, HUD and Metropolitan Council declaring the project area to be slum and blighted was arbitrary, capricious and in bad faith without discusssion, merely stating that it found "no arbitrary and capricious actions on the part of either the federal or the local agencies."

This decision makes it necessary for this Court to provide guidelines for the lower federal courts; for the record of the trial of this case in the District Court shows conclusively that if the standards set by HUD has been applied in this case honestly, accurately and objectively, the area would not have qualified; and the evidence further shows that the Commissioners of the

Nashville Housing Authority and the director did not even know what those standards were.

The evidence at the trial showed that both the Nashville Housing Authority and the Metropolitan Council, being ignorant of the standards to be applied and also being ignorant of the actual condition of the neighborhood, merely relied upon the report of the engineering firm of Clarke and Rapauno, the dual employee of both the Housing Authority and the beneficiary of the project, Vanderbilt University. The question which this record presents to this Court is whether public officials whose duty it is to determine whether or not an area is slum and blighted and whether citizens' property is to be taken from them may make a decision without having any informed judgment as to the merit of the particular project, or whether in so acting their decision is arbitrary, capricious and in bad faith. The further question then arises whether, being arbitrary, capricious and in bad faith, the courts will strike down such action.

This Court many years ago held that the courts may look into the facts justifying particular legislation to determine whether they did in fact exist and whether there was therefore a rational basis for its enactment. In *U. S.* v. *Carlene Products Co.*, 304 U. S. 144, 82 L. Ed. 1234, the court stated at page 152:

> "We may assume for present purposes . . . that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis."

The Court further stated as 153:

> "Similarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition . . ."

Put another way, legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property. *Western & A. Ky. Co.* v. *Henderson,* 279 U. S. 639 (1929).

In *Dobbins* v. *Los Angeles,* 195 U. S. 223, 49 L. Ed. 169, the Supreme Court set forth the following principles governing attack upon the validity of municipal legislation and stated at page 236:

> ". . . it is now thoroughly well settled by decisions of this court that Municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinances is a lawful exercise of the police power, *or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property* . . ." (Emphasis supplied.)

If the court will thus look behind the legislative enactment (as the ordinance of the Metropolitan Council approving the project was) *a fortiori* it will examine such actions by administrative agency.

The right to judicial review by one aggrieved by agency action under cases of this type has been sustained in a number of federal cases. *Norwalk Core* v. *Norwalk Redevelop. Agency,* 395 F. 2d 920; *Merge* v. *Sharott,* 3rd Cir. 1965, 341 F. 2d 989; *Gart* v. *Cole,* 2nd Cir. 1958, 263 F. 2d 244, cert. denied, 359 U. S. 978, L. ed. 2d 929; *Powelton Civic Home Association* v. *HUD,* E. D. Penn. 1968, 284 F. Supp. 209. And the Sixth Circuit recognized the right of judicial review of state agency action under the Federal Highway Act in *Nashville I-40 Steering Committee* v. *Ellington,* 6th Cir. (1967), 387 F. 2d 179. See also *Hardin* v. *Kentucky Utilities,* 1968, 390 U. S. 1, 19 L. Ed. 2d 787, and *Abbott Laboratories* v. *Gardner,* 387 U. S. 367 (1967).

Yet in this case the effect of the result in the District Court and the decision of the Court of Appeals is to ignore these rules.

If the action of officials who are ignorant of facts and likewise ignorant of rules and standards to apply to the facts are not reviewable, then there is no meaning to any rule of law providing that the courts will review arbitrary and capricious acts of government officials.

Applying the rule in Urban Renewal cases, it seems obvious that if a particular area does not qualify under the established criteria but is nevertheless approved, both the administrative and legislative determination (in the face of the true facts) are, to say the least, arbitrary and capricious.

Question III

The question of what is a fair and meaningful hearing before an administrative agency is one which has frequently arisen in the lower courts, but this Court has not directly passed on the question presented by this case and it is necessary that guidelines be defined by this Court as to what standards are to be applied in order to have a fair and meaningful hearing before administrative boards. This Court, in *Chicago, Burlington and Quincy Railroad* v. *City of Chicago,* 166 U. S. 276, 236, laid down the general rule that "in determining what is due process of law regard must be had to substance, not to form," but it is the applicability of that rule which is troublesome, the trial court finding in this case that an adequate hearing was accorded these property owners and the Court of Appeals not even discussing the question.

The contention of the petitioners that they were denied their right to a meaningful and substantive public hearing in connection with the question of whether the area qualified as slum and blighted and whether, therefore, their property was to be taken was dismissed by the Court of Appeals with the statement that it found "no procedural due process."

The effect of the decision of the Court of Appeals in this case likewise appears to conflict with the position the same court took in considering what was an adequate hearing before an administrative agency in *Nashville I-40 Steering Committee* v. *Ellington* (6th

Cir. 1967), 387 F. 2d 179. Moreover, the effect of the Court's decision in holding the hearing process adequate in this case seems to flatly contradict the principles laid down by the Fourth Circuit in *Appalachian Power Co.* v. *Environmental Protection Agency* (1974), 477 F. 2d 495, where that Court stated at page 503:

> "What is required in all instances, *whatever the character of the administrative action,* is 'the reality of an opportunity to submit an effective presentation,' and, if in the context of the issue involved, 'cross-examination on the crucial issues' is found proper, such right should be recognized and upheld." (Emphasis supplied.)

In this case petitioners were denied not only the opportunity to present evidence and cross-examine at the so-called hearing (being limited to a few minutes to express personal views) but also access to the necessary facts, data and statistical reports vital to make a defense. A hearing was held in form only, not substance. Nothing in the hearing process in this case approached the most minimum requirements.

In his work entitled ADMINISTRATIVE LAW, Peter Wall states at page 72:

> ". . . As presently defined, in order for due process to be operative in administrative proceedings, private parties must have opportunity for recourse to the formal hearing stage within the agency, for only at that state are procedures sufficiently formalized and opportunity present for further appeal to the judicial branch . . ."

The author went on to state at page 24:

> "In *Southern Ry. Co.* v. *Va.* the Court stated emphatically that a state statute authorizing an administrative officer to require railroads to substitute overhead crossings for existing grade crossings whenever it seemed necessary for the public safety and convenience violated the Fourteenth Amendment because of its failure to provide for notice and hearing. The Court noted that 'before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts.' "

The author's analysis of the *Southern Railway Company* case pictures a situation comparable to the dilemma of these plaintiffs; in its application there is little or no difference between a situation in which a statute authorizes an administrative body to take property without a hearing, and a situation in which the administrative body ignores the substantive effect of a statute requiring a hearing, the result being the same. In either instance the parties are denied their property without an opportunity to develop "the fundamental facts." Here the record conclusively shows that neither the NHA Commissioners nor the members of the Metro Council had any of the knowledge of the "fundamental facts" necessary to make an intelligent and rational decision as to whether the University Center is qualified as a slum and blighted area. Both bodies, it is clear from the record, relied upon the investigation of a private firm, whose interest it was to see that the area qualified, without attempting to

discover the specific facts revealed by the investigation and without giving property owners an opportunity to question or dispute the investigation. On the contrary, the facts developed at the trial conclusively show that these plaintiffs and other property owners were in fact prevented from questioning the investigation and the resulting project area report which was approved by NHA and the Council. It was not until after this lawsuit was filed that they were able to obtain the so-called "facts" supposedly established by the investigation. It was then of course too late to make any defense, or even an informed presentation, at the hearing.

Question IV

It was held in *Berman* v. *Parker,* 1954, 348 U. S. 26, 75 S. Ct. 98, 99 L. Ed. 27, that the fact that private interests will benefit from the taking of an individual's property in Urban Renewal projects will not necessarily render that taking unconstitutional. But it was not held that such a taking is constitutional when the object and purpose, rather than the effect, is to give the property to private interests, in the first instance. If the purpose and object of the project is a public one, as it was in *Berman,* that is one thing; if the object there had been to take the landowner's commercial establishment for the purpose of giving it to private interests to erect a new commercial establishment, that would have been altogether different.

In this case it is undenied that Vanderbilt intended, prior to the conception of this project, to acquire as

much of this property as possible for expansion this plan forming some time in the late 50's; that Vanderbilt either approached the Housing Authority, or vice versa, with a proposal that federal money be obtained to achieve Vanderbilt's ends; that when sufficient funds were not available, the 1960 nine hundred acre project was cut to Vanderbilt's specifications; that the concept, object and the purpose of the project became for Vanderbilt; and that they were not to be merely an incidental beneficiary of the project, as the statute contemplates, but the originator and cause thereof.

That it had already been decided to acquire this property for the University project before the inspection surveys had been made or any information as to the condition of the area had been obtained, is clearly shown by the record in this case. The problem then was not to determine whether the area qualified but to try to justify acquisition of the area for Vanderbilt, a purely private purpose with incidental public benefits.

While possibly broadening the "public use" concept to include "public benefit," it is submitted that *Berman* v. *Parker* did not go so far as to hold that the taking of private property for an urban renewal project would be constitutional if the project's primary purpose were for private benefit, so long as it has incidental public benefits. Yet that is the situation here.

The following rule, therefore, is still applicable to this case even in the light of *Berman* v. *Parker*.

> "To constitute a public use, the public must be, to some extent, entitled to use or enjoy the property as a matter of right . . . The use and benefit, hence, although it may be restricted to the inhabitants of a small area, should be common, and not limited to particular individuals or estates . . . On the other hand, the use is not public *where the benefit to the municipality is merely incidental and purely prospective* . . . and the fact that an enterprise serves or employs large numbers of people does not make its purpose a public use to authorize condemnation of property therefor . . ." McQuillen, Municipal Corporations, 3rd ed., Sec. 32.39a, p. 375. (Emphasis supplied.)

CONCLUSION

For the reasons set forth above, it is respectfully submitted that their petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

MEMORANDUM OPINION

(Filed September 30, 1971)

This is a suit brought by several persons who own property in the University Center Urban Renewal Project Area (hereinafter referred to as "Tennessee R-51") located in Nashville, Davidson County, Tennessee. The defendants are the Nashville Housing Authority (hereinafter referred to as "NHA"), Mr. Gerald Gimre, Secretary and Executive Director of NHA, and Vanderbilt University.[1]

BACKGROUND

In 1956 Vanderbilt University's Board of Trustees determined that the institution must prepare to meet future physical expansion needs required by a growing student population. The university retained a New York planning and engineering firm, Clark & Rapuano, to assist the school's administration in formulating a master plan for expansion. The university purchased approximately two million dollars' worth of property in the surrounding area between 1956 and 1961.

In December, 1960, Dr. Henry Hill, president of Peabody College, requested representatives of Vanderbilt University, Scarritt College and Peabody College to meet in order to discuss recently enacted urban renewal legislation to the Housing Act of 1949, i. e., 42 U.S.C. Sec. 1463. After this meeting, Nashville Mayor Ben West sent a letter to the respective presidents of these educational institutions and the Nashville Housing Authority requesting that the various institutions and business interests in the community cooperate in facilitating the redevelopment of the university area by pledging support to a University Center Urban Renewal Project. On February 4, 1961, in response to the

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[1]Neither the local metropolitan government nor the Department of Housing and Urban Development were parties to this action.

mayor's request, Vanderbilt Chancellor Branscomb committed the university to cooperate in attaining successful completion of the proposed project. In August, 1961, the Nashville City Council declared the area to be a slum and a blighted and deteriorated area, and initiated the proposed urban renewal project by making an application with the Department of Housing and Urban Development (hereinafter referred to as "HUD"), requesting that "survey and planning" funds be advanced in order to conduct the necessary surveys to determine if the area would qualify as an urban renewal project under the terms of the governing federal statutes and regulations. NHA is a non-profit organization formed under provisions of T.C.A. 13-801. et seq. It is composed of five commissioners. It is important to note that a housing authority in Tennessee must gain the approval of the governing body of the respective city or town as a condition precedent to initiation of a redevelopment project. T.C.A. 13-815.

Upon recognizing local support favoring the proposed urban renewal project, as evidenced by the Council's August, 1961, resolution, NHA initiated negotiations with HUD. HUD advised the local authorities as to what criteria were requisite to qualifying the project area for federal urban renewal funds. In this particular case, NHA filed an application with HUD in late 1961 requesting "survey and planning" funds to prepare a detailed plan for the proposed urban renewal project. HUD advanced these funds after approving the project planner, Clark & Rapuano, and tentatively approving the prospective plan.[2]

The original area included within the proposed project plan extended north to Charlotte Avenue (taking in property owned by Baptist Hospital and St. Thomas Hospital), south to Acklen Avenue, and east to Sixteenth Avenue,

[2]In 1961 NHA retained the same urban planning firm which Vanderbilt University had retained for formulating their institution's master plan.

South. The campuses of Vanderbilt University, Peabody College and Scarritt College were included within the proposed project area. During 1964 all of the area west of West End Avenue was excluded from the project area; the remaining area was referred to as the University Center Project. The University Center Project Area was divided into Phases I and II, and in 1967, due to a shortage of federal funds, the area in Phase II was deleted. (This deleted area included the Music Row section of the neighborhood.)

John T. Edmonds, Assistant Regional Administrator of Renewal Assistance for HUD's Atlanta regional office and former Regional Counsel for Urban Renewal from 1961-1966, cited the following criteria as considerations which HUD recognized in overseeing the proposed Nashville University Center Urban Renewal Project, Tennessee R-51:

(1) current physical condition of the project area;
(2) municipal needs;
(3) educational needs of the community and of the institutions in the area;
(4) hospital needs;
(5) traffic needs; and
(6) expansion needs of Eaken School.

In 1962 the NHA planners, through the use of the urban planning firm, conducted surveys of the structures and dwellings in the area to determine if it qualified as a slum and blighted area under the definitions and terms of the applicable Tennessee laws and the Federal laws and regulations (more specifically, HUD's Urban Renewal Manual). The original surveys were exterior in nature. They were checked for the accuracy of their results by subsequent interior surveys of ten per cent of the dwellings in the area. (The interior surveys were conducted under the supervision of inspectors of the Metropolitan Code Depart-

ment.) The original surveys were subsequently updated and re-evaluated in 1965 and 1967. Officials of HUD also toured and inspected the area on three separate occasions between 1962 and February, 1968. As a result of the inspection by HUD officials and a cutback in available federal funds, portions of the area were eliminated.

The eligibility requirements necessary to qualify an urban renewal area for federal funds are that at least 20 per cent of the buildings in the area be substandard, containing one or more building deficiencies, and at least two environmental deficiencies existing in the entire area. The urban planning firm, in its capacity of conducting the inspection surveys for NHA, concluded that the project area qualified under the federal requirements. Based upon this finding and the conclusions of the staff of NHA, the Board of Commissioners approved Part I of the University Center Urban Renewal Plan and the Board recommended the adoption of the Final Project Report to the Metropolitan Council.

The Final Project Report was submitted to the Metropolitan Council on August 1, 1967, at which time it was placed on file in the Metropolitan Clerk's offic. On August 7, 1967, the Council held a "public" meeting to allow public debate on the proposed project and the contents of the Final Project Report. On August 15, 1967, the Council passed Ordinance No. 67-278, thereby adopting the findings of the NHA and its consultants that the University Urban Renewal Center area, Phase I, constituted a "slum blighted and/or deteriorated area" within the technical definitions established under the state and federal urban renewal laws and regulations. As stated in the Final Project Report Part I, Application for Loan and Grant, Code No. R-213, the objectives of the urban renewal plan are:

"a. To clear and provide for the redevelopment of portions of the Project Area in which the majority of

structures are beyond feasible rehabilitation and in which the present subdivision of land and ownership pattern preclude the orderly assemblage, or use, of land or change in type of intensity of land uses are necessary. Within such areas, it may be required, it being within the objectives of this Urban Renewal Plan, that certain buildings which are not structurally substandard will be acquired and demolished, sold for relocation onto another site, or sol dwith a larger tract of land to insure that the future use of the tract will be of such density and design as to meet the long-range needs of the Project Area residents.

"b. To initiate a continuing program for the rehabilitation and maintenance of older structures in portions of the Project Area in which the existing streets and lot areas are adequate to serve future needs and in which majority of structures are suitable, financially, for retention and continued use. But within these areas, to remove structures which through substandard construction or inadequate maintenance are not suitable for rehabilitation and if not removed would remain as blighting influences on the surrounding development.

"c. To create and preserve strong, stable residential areas which are free from detracting influences that cause excessive traffic, noise, congestion, or other objectionable or hazardous conditions.

"d. To establish a harmonious land use pattern which separates incompatible land uses and also provides suitable sites that are adequate for future land use needs.

"e. To provide for the orderly and coordinated expansion of the Vanderbilt University, Peabody College, and Scarritt College campuses and to improve the environment in their vicinity.

"f. To provide sites of adequate size necessary for the orderly and coordinated expansion of the existing Hillsboro Village shopping area as an integrally designed shopping center with adequate off-street parking, improved shopper conveniences and space for expanded and new facilities.

"g. To enable and encourage continued development of the "Music City" area for uses related to the recording industry.

"h. To provide a site for the development of additional recreation facilities adjacent to Cavert-Eakin Schools.

"i. To provide for the improvement of the street system by the closing of existing streets, the widening or adjustment of existing streets, and the construction of new streets and a Boulevard which will facilitate public and private transportation to and from the Project Area, separate through traffic from interior circulation traffic, accommodate the anticipated traffic volumes, and provide for the convenience and safety of the residents and pedestrians.

"j. To establish standards for redevelopment and continued uses that will provide the greatest flexibility to the individual owner or developer, yet assure adequate light, air density, off-street parking, etc., and otherwise insure the stability of the Project Area in the future."

The Final Project Report was submitted to HUD with an application for a loan and grant contract, thereby requesting acceptance and approval of Tennessee R-51 as a qualifying area for federal urban renewal assistance. HUD approved the application and issued an allocation order to the Atlanta regional office on March 20, 1968.

Plaintiffs allege that there has been a violation of the Administrative Procedures Act, 5 U.S.C. Sec. 702, et seq., the due process clause of the Fourteenth Amendment of the United States Constitution, the Housing and Urban Renewal Act, and that 42 U.S.C. Sec. 1463 is unconstitutional. Additionally, plaintiffs allege that the NHA and the Metropolitan Government, a non-party to this lawsuit, have made arbitrary and capricious findings in concluding that the area was a slum, blighted and/or deteriorated area within the meaning of the Housing and Urban Renewal Act, and that there was a conspiracy between NHA and Vanderbilt University which resulted in the NHA recommending the adoption of their erroneous findings included in the Final Project Report which was submitted to the Metropolitan Council. Finally, plaintiffs aver that two commissioners of the local housing authority had a conflict of interest in violation of T.C.A. Sec. 13-910.

Plaintiffs request the following relief:

(1) to enjoin the defendants from initiating eminent domain proceedings for the purpose of acquiring plaintiffs' property, and to recover damages for the amount of diminution in value of plaintiffs' property;

(2) to be entitled to a declaratory judgment of their respective rights pursuant to Rule 57 of the Federal Rules of Civil Procedure, and an adjudication that 42 U.S.C. Sec. 1463 is unconstitutional; and

(3) any other relief which would be appropriate.

Plaintiffs claim that they are entitled to the aforementioned relief for the following reasons:

(1) The area within the University Center Urban Renewal Project, Tennessee R-51, is not a slum,

blighted and/or deteriorated area within the meaning of the federal and state urban renewal laws and regulations.

(2) Any findings supporting such a determination are so baseless and so lacking in accuracy and fact as to constitute arbitrary, capricious and bad faith action on the part of the NHA in relying thereon.

(3) Members of the NHA and the Director of Urban Renewal for the Housing Authority were so lacking in knowledge whatsoever as to the necessary criteria as to make their decision arbitrary, capricious and in bad faith.

(4) Plaintiffs were entitled to and denied an opportunity to examine project area plans, surveys, records, etc.

(5) Plaintiffs were entitled to and denied a meaningful hearing.

(6) A conflict of interest existed between members of the local housing authority who had connections and official positions with several banks which were depositories of Housing Authority and Vanderbilt University funds and the same banks had several high officials serving on the Vanderbilt Board of Trustees.

(7) Official of the NHA and Vanderbilt University maliciously and unlawfully conspired to take plaintiffs' property in violation of their individual rights to due process of law and equal protection of the law.

(8) 42 U.S.C. Sec. 1963 is unconstitutional because it allows the "taking" of property for private rather than for public purposes.

(9) If 42 U.S.C. Sec. 1963 is constitutional, this project is in contravention thereof because it is solely for a private purpose.

Defendant Vanderbilt University maintains the following theory:

(1) 42 U.S.C. Sec. 1460 requires that the Secretary of HUD determine that an area is blighted and appropriate for urban renewal; the determination is not made by the local housing authority.

(2) The determination that an area is to be included in an urban renewal project is not subject to judicial review in the absence of arbitrary, capricious or bad faith action.

(3) The determination that the area included in the University Center Urban Renewal Project, Tenn. R-51, was a slum, blighted and/or deteriorated area was made in good faith and was based upon facts supporting said determination.

(4) Vanderbilt University did not deliberately permit property owned by it in the project area to become substandard in order to qualify the area as a blighted or substandard area.

(5) No commissioner or employee of NHA is an official or employee of Vanderbilt University, therefore, there has been no violation of T.C.A. 13-910.

(6) Neither Sec. 10 of the Administrative Procedures Act, 5 U.S.C. Sec. 702, nor any other section of that Act requires a public hearing for the adoption of the project.

(7) The public hearing required by 42 U.S.C. Sec. 1455(d) was held.

(8) None of the plaintiffs have standing to maintain this action.

Defendant Nashville Housing Authority maintains the following theory:

(1) The University Center Urban Renewal Project, Tenn. R-51, was found to be a slum, blighted and/or deteriorated area within the meaning of the state and federal urban renewal laws.

(2) The administrative determination made was based upon facts supporting said determination, and it was accurate and in good faith.

(3) The urban renewal plan was properly adopted by the Metropolitan Council.

(4) Plaintiffs were given adequate opportunities to be heard as required by law.

(5) The requirements of the Administrative procedures Act, if applicable to the Housing Authority, were complied with.

(6) There was no conspiracy between NHA and Vanderbilt University to deprive plaintiffs of their property through the subterfuge of a public project.

(7) There was no conflict of interest between members of the Board of Commissioners of NHA.

(8) 42 U.S.C. Sec. 1463 is constitutional and this project has a public purpose.

SCOPE OF REVIEW

What is the scope of judicial review that this Court has over the determination and recommendation made by NHA that the University Center Urban Renewal Project Area constituted a slum, blighted and deteriorated area?

Plaintiffs introduced evidence showing that the neighborhood in the project area consists of a heterogeneous group of persons. A number of elderly persons who are among the upper middle class of Nashville society have resided in the neighborhood for a number of years. Many of the residents rent rooms to students who attend the several colleges in the neighborhood. Some properties are exclusively used for rental purposes. Most of the dwellings in the neighborhood have been standing for more than thirty years. Residents of the neighborhood testified as to the stimulating intellectual atmosphere which exists throughout the area due to the neighboring educational facilities and the intermingling of the various individual pursuits and endeavors engaged in by the local residents.

Residents in the area and the Nashville community were apprised of the proposed University Center Urban Renewal Project in 1961 when the proposed project was announced in the local newspapers. Residents were given the opportunity to attend general neighborhood meetings to learn of the effect and purpose of the pending program. No specific information was given to the residents in regard to the results of the 1962 inspection surveys conducted by the NHA planners until after the Metropolitan Council had approved the project in August, 1967. The residents received copies of summary sheets disclosing the inspectors' evaluation of their individual parcel of property subsequent to the Council vote.

By compiling information gathered from individual summary sheets, plaintiffs concluded that there were substantial discrepancies in regard to the information which had been presented to the Council as to the physical condition of the neighborhood. Several of the alleged discrepancies were:

(1) Fifty-nine structures represented to the Council as constituting substandard or blighting influences warranting clearance had been demolished or razed when the Council approved the project.

(2) There was an inaccurate count as to the number of structures standing in the area.

(3) Several structures which had been rated as warranting clearance due to inadequate conversion or excessive occupancy were not as warranted and, in fac , were not used as rental properties.

(4) Several structures which had been rated as warranting clearance due to various building deficiencies had been cured with subsequent repairs since the original 1962 survey.

(5) The margin of error in the results of the exterior surveys as shown by a comparison of the results of the 10 per cent interior surveys was 28 per cent rather than 1 to 3 per cent as was represented to the Council.

Councilman James A. Hamilton testified that he had presented evidence of the abovementioned discrepancies to the Council before they adopted the NHA Final Project Report. He also advised the Council of the alleged conspiracy which existed between NHA and Vanderbilt University. Many of the residents and plaintiffs attended the public meeting of the Council on August 7, 1967, and presented their individual protestations to evidence their dis-

pleasure with the legislation pending before the municipal fathers. After the local governing body passed the ordinance on August 15, 1967, which adopted the findings of the NHA, the plaintiffs and others presented their evidence of alleged inaccuracies in the Final Project Report to officials of HUD. The federal officials took notice of the displeasure of the protesting parties and considered the results compiled and presented to HUD by NHA in light of the evidence submitted by plaintiffs and others. HUD officials met with the plaintiffs and with representatives of NHA. In March, 1968, HUD approved the University Center Urban Renewal Project, Tennessee R-51.

HUD has the responsibility to establish and administer the necessary regulations to achieve the congressional intent of the federal urban renewal legislation.

Sec. 1441 of 42 U.S.C., the Slum Clearance Act, states the purpose of the Act as follows:

> "Sec. 1441. *Congressional declaration of national housing policy.* The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. The Congress further declares that such production is necessary to enable the housing industry to make its full contribution toward an economy of maximum employment, production, and purchasing power. The policy

to be followed in attaining the national housing objective established shall be: (1) private enterprise shall be encouraged to serve as large a part of the total need as it can; (2) governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need; (3) appropriate local public bodies shall be encouraged and assisted to undertake positive programs of encouraging and assisting the development of well-planned, integrated residential neighborhoods, the development and redevelopment of communities, and the production, at lower costs, of housing and sound standards of design, construction, livability, and size for adequate family life; (4) governmental assistance to eliminate substandard and other inadequate housing through the clearance of slums and blighted areas, to facilitate community development and redevelopment, and to provide adequate housing for urban and rural non-farm families with incomes so low that they are not being decently housed in new or existing housing shall be extended to those localities which estimate their own needs and demonstrate that these needs are not being met through reliance solely upon private enterprise and without such aid; . . ."

The definition of "urban renewal area" under Sec. 1460 (a) of 42 U.S.C. comes closest to defining "blighted area" or "slum":

> "'Urban renewal area' means a slum area or a blighted, deteriorated, or deteriorating area in the locality involved which the Secretary approves as appropriate for an urban renewal project."

HUD's administrative determination and decision that Tennessee R-51 qualified under the requirements of the federal

law is not subject to review in this Court because HUD is not a party-defendant.

In the absence of a "clear and palpable" abuse of power by the Legislature or administrative agency no judicial supervision is available to question the necessity for a public taking and the area required to accomplish such. *Harper* v. *Trenton Housing Authority,* 274 S. W. 2d 635, 645 (Tenn. 1954) (numerous citations therein).

In regard to the determination and recommendation of NHA and the adoption thereof by the Metropolitan Council, "blighted areas" are defined in the Tennessee Slum Clearance Law as:

> "13-813 T.C.A. Blighted areas defined.—Blighted areas are areas (including slum areas) with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use, or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community."

As considered by the Supreme Court of the State of Washington:

> ". . . the issue of blight (likewise, the conclusion of this court) is not material, as neither this court nor the superior court has been designated by the legislature to determine from the evidence submitted whether or not an area is 'blighted'. The legislature has designated 'the local governing body' (City Council) to make that determination. However, the courts should not approve such a determination unless it rests on certain basic criteria that will support a constitutional public use.

"The courts will not interfere with a determination by a local governing body merely because of a lack of accord with its conclusion, provided, in cases such as this: (a) the protesting property owners have been given an adequate opportunity to be heard; (b) it is clear that criteria have been applied which will support a constitutional public use; and (c) there is sufficient evidence supporting the specific finding or findings of fact upon which an ultimate determination of 'blight' is based to prevent its being regarded as an arbitrary or capricious determination." *Apostle* v. *City of Seattle,* 422 P. 2d 289, 292 (Wash. 1966).

The Council was advised of the alleged errors in the Final Project Report and the alleged conspiracy; yet, after consideration of the evidence before it, the Council adopted Metropolitan Ordinance 67-278 on the basis of the included statement of facts. This Ordinance reads as follows:

"WHEREAS the Local Public Agency has made detailed studies of the location, physical condition of structures, land use, environmental influences, and social, cultural, and economic conditions of the Project area and has determined that the area is a slum area, blighted, deteriorated and deteriorating that it is detrimental and a menace to the safety, health, and welfare of the inhabitants and users thereof and of the Locality at large, because there are within said area buildings and improvements which by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, improper conversion, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use, obsolete layout and a combination of these factors are detrimental to the safety, health, morals and welfare of the community and should be eliminated in the public interest, and the members of

this Governing Body have been fully apprised by the Local Public Agency and are aware of these facts and conditions; and

"WHEREAS there has been prepared and referred to the Metropolitan Council of the Locality (herein called 'Governing Body') for review and approval an Urban Renewal Plan for the Project area, dated July 10, 1967, and consisting of 34 pages, Exhibits A, B, C and D attached thereto and three maps supported by certain supplementary material, data, and recommendations, which material, data and recommendations are not a part of the Urban Renewal Plan; and . . . ."

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"NOW, THEREFORE, BE IT ORDAINED BY THE METROPOLITAN COUNCIL OF NASHVILLE AND DAVIDSON COUNTY:

"1. That it is hereby found and determined that the project is a slum and blighted area, as defined in Section 13-813, Tennessee Code Annotated, and qualifies as an eligible Project area under the provisions of Sections 13-814 through 13-827, Tennessee Code Annotated, and that the blight and slum conditions existing therein are detrimental to the safety, health, morals and welfare of the people of Nashville-Davidson County, and the said area or such portions thereof as deemed necessary for acquisition by The Nashville Housing Authority and shall be so designated by it pursuant to the Urban Renewal Plan, or any amendment or amendments thereto, should be so acquired by The Nashville Housing Authority, and such blight and slum conditions eliminated.

"2. That the Urban Renewal Plan for the Project, having been duly reviewed and considered, is hereby approved, and the Metropolitan Clerk be and is hereby directed to file said copy of the Urban Renewal Plan with the minutes of this meeting.

"3. That it is hereby found and determined that the objectives of the Urban Renewal Plan cannot be achieved through more extensive rehabilitation of the Project area.

"4. That it is hereby found and determined that the Urban Renewal Plan for the Project area conforms to the general plan of the Locality."

This Court holds that the decision by the Metropolitan Council was a political decision made wthin its legislative powers inherent to its duty to represent the general public. The evidence does not demonstrate that the Council determination, based on the findings of NHA included in the Final Project Report, was arbitrary and capricious, constituting "clear and palpable abuse" of its legislative responsibilities.

"A redevelopment agency must approach the problem of the blighted parts of the community on an area, rather than on a structure by structure, basis, and it is immaterial that some particular structure within such area may be safe, sound, and well kept." *Starr* v. *Nashville Housing Authority,* 145 F. Sup. 498, 503 (M.D. Tenn. 1956), citing *Berman* v. *Parker,* 348 U. S. 26 (1954).

"Courts have consistently denied the standing of citizens to challenge the choice made by public authorities between different and competing public uses. The legislature, through its lawfully created agencies, rather than 'interested' citizens, is the guardian of the public needs to be served by social legislation." *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Finance Agency,* 310 f. 2d 99, 105 (7th Cir. 1962) (numerous citations therein).

"Once the question of public purpose has been decided, the amount and character of the land to be taken

for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legisaltive branch of the government." *Starr* v. *Nashville Housing Authority, supra,* at 503, *citing Berman* v. *Parker, supra.*

CIVIL CONSPIRACY

Did Vanderbilt University and NHA unlawfully conspire to deprive plaintiffs of their property?

Plaintiffs maintain that the project was initially conceived and planned for the benefit of Vanderbilt University in order to allow the university to:

(1) acquire property for expansion which would not be available by a negotiated purchase;

(2) obtain the benefits which would accrue from new streets and sewers without incurring any substantial expense; and

(3) effectively control the future development of the neighborhood adjacent to the campus.

A civil conspiracy is a combination or agreement between two or more persons to do a harmful, wrongful injury to another person. *Smoky Mountains Beverage Co.* v. *Anheuser-Busch, Inc.,* 182 F. Supp. 326 (E.D. Tenn. 1960). Plaintiffs assert that several badges of conduct evidence the existence of a conspiracy between NHA and the university.

Plaintiffs maintain that two commissioners of the NHA had a conflict of interest when they approved the project. Tennessee has a conflict of interest statute as part of the Housing Law which provides:

"13-910. *Interest of commissioners or employees in contracts—Misconduct.*—No commissioner or employee of an authority shall acquire any interest direct or indirect in any housing project or in any property in-

cluded or planned to be included in any project, nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any housing projects. If any commissioner or employee of an authority owns or controls an interest direct or indirect in any property included or planned to be included in any housing project, he shall immediately disclose the same in writing to the authority and such disclosure shall be entered upon the minutes of the authority. Failure to so disclose such interest shall constitute misconduct in office."

The evidence disclosed the following facts. Mr. Sam Fleming, president of the Third National Bank of Nashville, has been a member of the Board of Trustees of Vanderbilt University since 1951. Mr. Gayle Gupton, a commissioner on the NHA from March, 1961, to March, 1970, is an officer of the Third National Bank of Nashville. Mr. Andrew Benedict, Chairman of the Board of the First American National Bank of Nashville, has been a member of the Board of Trustees of Vanderbilt University since May, 1965. Mr. Scott Fillebrown, a commissioner of the NHA from April, 1963, to November, 1969, is president of the First American National Bank of Nashville. Chancellor Alexander Heard of Vanderbilt University was a member of the Atlanta Region Federal Reserve Board for the years 1966-67. Both of the abovementioned banking institutions were depositories for NHA and Vanderbilt University funds.

None of these facts evidenced the existence of a conflict of interest on the part of either of the two NHA commissioners. NHA and the university have funds on deposit with all of the local banks and with several foreign state banks. NHA's "planning and survey" account was withdrawn from the First American National Bank at the in-

struction of Mr. Fillebrown after he had recently been elected as chief commissioner of the NHA in 1964. No evidence was introduced into the record which decribed the influence or authority which could be exerted by a regional board member of the Federal Reserve Board; instead, the evidence disclosed that all policy-making decisions were made by the Federal Reserve Board in Washington, D. C., not at the regional level.

In regard to the alleged conflict of interest of the two members of the NHA, no evidence was introduced which demonstrated that these individuals even discussed the proposed project at work with their respective superior officers, who were members of the Vanderbilt Board of Trustees. Mr. Sam Fleming is the only individual who had a positon of influence when the Council initiated the project in August, 1961. No evidence was introduced which showed that the NHA commissioners had any concern for anything other than the betterment of Nashville.

This Court does not believe that members of the banking community must withdraw themselves from community involvement in order to avoid being burdened with individual responsibilities which arise from participation in community activities rather than from their employment responsibilities. The evidence did not disclose anything which would be suspect of or tainted with self-interest on the part of any of these individuals or institutions. Instead, there was substantial evidence of a dedication to public purpose and public responsibility on the part of each person individually, and each institution separately involved. As to the individuals, the evidence affirmed the importance and the standard of quality of their individual efforts which they contributed to the betterment of the Nashville community.

Vanderbilt did not initiate the idea to seek urban renewal funds from the federal government. The university began to carry out a plan for expansion in 1956, and it

planned to continue its expansion whether or not the project became a reality.

At its inception, the University Center Urban Renewal Project included the Hillsboro Village shopping area, the Music Row area and the university and hospital complexes. When the plan was approved by the Nashville City Council in August, 1961, it was foreseen as a project which would be of benefit to the entire Nashville community. Vanderbilt was to benefit, as were the other universities in the area and the music industry and economic interests which were located in the area. The project was to provide a vehicle for orderly expansion, reduce traffic problems, and provide minimal costs for improving utilities and sewers in the area.

Plaintiffs maintain that Vanderbilt University purposefully purchased property in the area and allowed it to deteriorate in order to attempt to qualify the area under the federal standards and to diminish the value of neighboring property.

Councilman James Hamilton testified that he had attended a meeting on July 5, 1967, with several NHA members and Vanderbilt Chancellor Heard and other Metropolitan government officials. Councilman Hamilton testified that Chancellor Heard stated that Vanderbilt was not carrying out demolitions in order to qualify the area for eligibility as an urban renewal project, in response to the advice of the NHA. Vice Chancellor Rob Roy Purdy of Vanderbilt testified that he had been present with Chancellor Heard when this conversation took place between Councilman Hamilton and the Chancellor. Purdy recalled the substance of the Chancellor's statement to be that the university had been told that any demolitions of substandard university properties would not disqualify a particular parcel's rating and that the university could continue to carry

out its demolition program without affecting the qualifying percentages of the area.

No evidence was introduced which demonstrated that Vanderbilt had a policy of maintaining deteriorated properties in order to effect qualification of the area. Instead, the policy of the university was to renovate any property which could be suitable for rental; otherwise, the structures were demolished. Between 1962 and 1967 Vanderbilt demolished 98 structures out of a total of approximately 250 structures which the university owned. On March 17, 1967, Vanderbilt did inquire of HUD officials as to whether or not continued demolitions of buildings would affect the qualifications of the area,[3] but there was no evidence of any affirmative conduct by Vanderbilt which demonstrated a positive plan to refrain from carrying out demolitions of deteriorated structures.

Plaintiffs assert that a badge of conspiracy was evidenced by the fact that both NHA and Vanderbilt employed the same planning firm. Vanderbilt retained the engineering firm of Clark & Rapuano in the late 1950's to assist the university in formulating its master plan for future expansion. In 1961 NHA retained the firm of Clark & Rapuano to assist in planning and conducting the required inspection surveys and gathering the requisite information to determine whether the proposed project area would qualify under the federal urban renewal requirements.

No evidence was introduced which showed that the engineering firm intermingled or combined its efforts or duties which it owed to its two respective clients. No evidence demonstrated that the firm attempted to combine its efforts in achieving a single objective of facilitating Vanderbilt expansion through the urban renewal process. In

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[3]Assurance was received that demolition or buildings would not affect qualification of the area.

fact, the original plan encompassed an area much larger than the University Center Urban Renewal Project Area, Phase I. No evidence demonstrated that the engineering firm deliberately carried out the inspection surveys in the area to achieve the requisite qualifying percentages. If HUD approved the loan and grant application there was no guarantee to the planning and surveying firm that it would be retained to complete the project.

Finally, plaintiffs assert that, because Vanderbilt's attorney answered questions at the public meeting at Eakin School, he was representing the combined interests of Vanderbilt and NHA. No proof was entered to show that the attorney was present at the meeting in any capacity other than as a representative of Vanderbilt, a property owner in the neighborhood.

The inferred badges of conspiracy relied upon by plaintiffs without proof do not constitute evidence. In summary, plaintiffs have merely made assertions without substantial evidence supporting their respective positions.

FAIR AND MEANINGFUL HEARING

Were plaintiffs entitled to and denied a fair and meaningful hearing?

Plaintiffs and other property owners attended a public hearing sponsored by NHA on November 4, 1965. The proposed plans of the project were discussed and questions were answered in regard to the effect of the project on the neighborhood. NHA sponsored another meeting of the property owners on July 19, 1967, at which time the final plans for the project were discussed. The residents were not permitted to ask questions about their individual parcels or about specific results of the inspection surveys. NHA opened a project site office in the area to give individual residents an opportunity to see the results of the inspection survey. Property owners did not receive copies

of the inspection survey sheets until after the Metropolitan Council had approved the project area for urban renewal.

On August 7, 1967, the Metropolitan Council held a public Council meeting to allow public debate on the proposed urban renewal project. Plaintiffs alleged that this was not a meaningful hearing because they were not supplied information regarding their individual properties and that they were limited in the amount of time in which they could voice their individual protests to the pending project. Councilman Hamilton advised the Council of the alleged discrepancies in the results and findings of the surveys, and he informed the Council that this project was the result of an alleged conspiracy between Vanderbilt University and the NHA. The Council was also advised that there had been a substantial number of demolitions of structures which were represented in the Final Project Report as qualifying as substandard or blighting influences, warranting clearance. Plaintiffs and other property owners voiced their protests to the Council; others echoed their support for the project. On August 15, 1967, the Council adopted the Final Project Report and recommendations of the NHA and its consultants, concluding that the area within Tennessee R-51 constituted a "slum, blighted and/or deteriorated area" within the meaning of the state and federal urban renewal laws and regulations.

Title 42 U.S.C. Sec. 1455(d) imposes the following hearing requirement upon the local authorities:

> "(d) No land for any project to be assisted under this subchapter shall be acquired by the local public agency except after public hearing following notice of the date, time, place, and purpose of such hearing."

After reviewing all of the evidence, this Court holds that NHA complied with the federal requirements of 42 U.S.C. Sec. 1455(d).

The State of Tennessee imposes a public hearing requirement on the governing body of the local city or town as a condition precedent to the initiation of a redevelopment project, T.C.A. 13-815.

"13-815. *Conditions precedent to initiation of redevelopment project — Approval by municipality of plan.*—An authority shall not initiate any redevelopment project under the Housing Authorities Law until the governing body (or agency designated by it or empowered by law so to act) of each city or town (hereinafter called 'municipalities') in which any of the area to be covered by said project is situated, has approved a plan (herein called the 'redevelopment plan') which provides an outline for the development or redevelopment of said area and is sufficiently complete;

"(1) To indicate its relationship to definite local objectives as to appropriate land uses and improved traffic, public transportation, public utilities, recreational and community facilities and other public improvements;

"(2) To indicate proposed land uses and building requirements in the area; and

"(3) To indicate the method of the temporary relocation of persons living in such areas, and also the method of providing (unless already available) decent, safe and sanitary dwelling substantially equal in number to the number of substandard dwellings to be cleared from said area, at rents within the financial reach of the income groups displaced from such substandard dwellings. Such municipalities are hereby authorized to approve redevelopment plans through their governing body or agency designated by it for that purpose. Any state public body referred to in

Sec. 13-809 shall have the rights and powers to cooperate with and assist housing authorities with respect to redevelopment projects in the same manner as though the provisions of said section were applicable to redevelopment projects.

"Provided, however, said governing body shall not approve a plan until after a public hearing has been held by said governing body (or agency designated by it or empowered by law so to act) to determine the necessity for the adoption of said plan, including the matters set forth in sub-paragraphs (1), (2), and (3) of this section. Notice of such public hearing shall be given in the following manner:

"(a) By publishing once a week for three (3) consecutive weeks immediately preceding said public hearing in each newspaper of general circulation published in said municipality notice of the time, place, and purpose of said public hearing, which notice shall include a facsimile of a map of the area to be included in the plan with the streets or other lines marking the boundaries thereof clearly indicated, and which map shall be not less than four (4) columns in width; and

"(b) By written notice to at least one (1) of the owners or at least one (1) of the occupants of each parcel of property within the area to be included within the plan of the time, place and purpose of such public hearing, which notice shall be sent not more than thirty (30) days and not less than ten (10) days before the hearing by mail, postage prepaid, or delivered, to such owners or occupants.

"Provided, further, that the failure to give the notice required in clauses (a) and (b) of this section may be raised only by an owner or occupant having

an interest in property within said area as a defense on the trial of the issue of the right of the housing authority to acquire the property of such owner or occupant by eminent domain and such failure shall constitute a defense unless in the judgment of the court trying such issue there has been compliance with clause (a) hereof and substantial compliance with clause (b) hereof by mailing or delivering the notice therein provided to at least one (1) owner or one (1) occupant of each of not less than two-thirds (2/3) of the lots of parcels of property within said area."

After reviewing all of the evidence, this Court holds that the public Council meeting on August 7, 1967, satisfied the requirement of T.C.A. 13-815.

HUD officials allowed plaintiffs to submit documentary evidence in support of their charges that the NHA Final Project Report was inaccurate. The HUD officials also met with plaintiffs and other property owners to allow them to present their arguments against the project. HUD officials also gave plaintiffs access to any files or materials which were required to be made available by the requirements of the federal Public Information Act. Although HUD is not a party to this lawsuit, this Court finds that the federal agency acted in good faith and satisfied its responsibility of providing the type of hearing necessary in carrying out its "legislative fact-finding" duties. *See Powelton Civic Home Owners Association* v. *Department of Housing and Urban Development,* 284 F. Supp. 809, 829-32 (E.D. Pa. 1968).

JURISDICTION

Does this federal court have jurisdiction over the matter in controversy?

Plaintiffs assert that jurisdiction is vested in this Court under Sec. 10 of the Administrative Procedures Act, 5 U.S.C. Sec. 702, et seq.; 28 U.S.C. Sec. 1331; Rule 57 of the Federal Rules of Civil Procedure; and the Fourteenth Amendment of the United States Constitution. Additionally, plaintiffs assert that the amount in controversy exceeds $10,000 exclusive of interests and costs.

Section 10 of the Administrative Procedures Act, 5 U.S.C. Sec. 702, provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, within the meaning of a relevant statute, is entitled to judicial review thereof."

This section of the Act does not necessarily provide the basis for a federal right to judicial review of an urban renewal plan, especially in absence of a federal party-defendant. *Green Street Association* v. *Daley,* 373 F. 2d 1, (7th Cir. 1967), *citing Harrison-Halstead Community Group, Inc.* v. *Housing & Home Finance Agency,* 310 F. 2d 99 (7th Cir. 1962) cert. denied 373 U. S. 914 (1963). "Agency" is defined, as applying to this section of the Administrative Procedures Act, as "each authority of the government of the United States. . . ." 5 U.S.C. Sec. 701. No evidence was introduced or authority cited to this Court which demonstrated that either of the defendants qualify as an "agency" under the terms of the aforementioned statute. The Department of Housing and Urban Development is the authority of the government of the United States which determines that a local area qualifies for federal urban renewal funds. The local housing authority

gathers the necessary criteria and formulates the requisite plans to ascertain whether submitting an application to the federal authorities would be appropriate; then the local governing body must adopt and approve the plan in order to demonstrate community sanction for the proposed project. Upon receipt of the application for loan and grant funds, HUD is required to determine if the project qualifies under the applicable federal requirements.

This Court recognizes that a local urban renewal plan must comply with the requirements of the federal *Urban Renewal Manual,* but the determination of compliance is solely the responsibility of HUD. Any arbtirary or capricious decision by HUD which affronts the terms of the maual may be subject to adjudication and review in a federal forum, but it is necessary that such an attack be directed against HUD as a party-defendant. See *Powelton Civic Home Owners Association* v. *Department of Housing and Urban Development,* 284 F. Supp. 809, 827-28 (E.D. Pa. 1968).

Plaintiffs also assert that jurisdiction is vested in this Court under the federal question statute, 28 U.S.C. Sec. 1331, as amended July 25, 1958, 72 Stat. 415.

> "Sec. 1331. *Federal question; amount in controversy; costs*
>
> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treatises of the United States.
>
> (b) Except when express provisions therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the

> defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

Assuming that the matter in controversy exceeds the sum or value of $10,000 exclusive of interests and costs, this Court is not convinced that the matter in controversy arises under the Constitution, laws, or treatises of the United States which requires a federal forum.

Plaintiffs allege violations of their right to due process of law and to equal protection of the laws as guaranteed to them under the Fourteenth Amendment. In the absence of a showing that a state forum would not provide an adequate remedy to safeguard an individual's federal constitutional rights, any alleged deprivation of rights inflicted by a local agency must be adjudicated before the appropriate state forum.

> "The state courts are as firmly bound by the Constitution of the United States as is this (Federal) Court and (the proper) forum for the enforcement of any constitutional rights that may have been violated is in the . . . state courts with the right of ultimate determination by the Supreme Court of the United States." *Green Street Association* v. *Daley, supra,* at 6, 7, quoting *Baber* v. *Texas Utilities Company,* 228 F. 2d 665, 666 (5th Cir. 1965).

The alleged deprivation of a fair and meaningful hearing on the urban renewal project does not raise a substantial federal question of due process as would entitle plaintiffs to enjoin the urban renewal process. *Green Street Association* v. *Daley, supra,* at 6.

Plaintiffs contend that the "taking" of their property for this particular urban renewal project is "not for a public

purpose, use, necessity or benefit; but, on the contrary is . . . for the private purpose and benefit of Vanderbilt University. . . ." It is generally recognized that the determination of whether land to be acquired for an urban renewal project will be devoted to a public purpose is more appropriate for the state court to make in the condemnation proceedings.

> "(C)ases presenting challenges to urban renewal programs are matters for the condemnation proceedings in the state courts if the taking is ostensibly for a public purpose, even though violations of federally guaranteed rights are claimed. Only . . . where facts alleged indicate to all outward appearances that the taking is designed solely to deny constitutional rights, is the power of eminent domain subject to prior scrutiny of the federal courts." *Green Street Association* v. *Daley, supra,* at 7.

In reference to the case at bar, Congress has specifically recognized the public advantages resulting from urban renewal projcts in university and hospital areas. 42 U.S.C. Sec. 1463 provides:

> "Sec. 1463. *Financial assistance for urban renewal projects in areas involving colleges, universities, or hospitals—Authorization; local grant-in-aid.*
>
> "(a) In any case where an educational institution or a hospital is located in or near an urban renewal project area and the governing body of the locality determines that, in addition to the elimination of slums and blight from such area, the undertaking of an urban renewal project in such area will further promote the public welfare and the proper development of the community (1) by making land in such area available for

disposition, for uses in accordance with the urban renewal plan, to such educational institution or hospital for redevelopment in accordance with the use or uses specified in the urban renewal plan, (2) by providing, through the redevelopment of the area in accordance with the urban renewal plan, a cohesive neighborhood environment compatible with the functions and needs of such educational institution or hospital, or (3) by any combination of the foregoing, the Secretary is authorized to extend financial assistance under this subchapter for an urban renewal project in such area without regard to the requirements in section 1460 of this title with respect to the predominantly residential character or predominantly residential re-use of urban renewal areas. The aggregate expeditures made by any such institution or hospital (directly or through other public corporation) for the acquisition within, adjacent to, or in the immediate vicinity of the project area, of land, buildings, and structures to be redeveloped or rehabilitated by such institution for educational uses or by such hospital for hospital uses in accordance with the urban renewal plan (or with a development plan proposed by such institution for educational uses or by such hospital for hospital uses in accordance with the urban renewal plan (or with a development plan proposed by such institution, hospital, or corporation, found acceptable by the Secretary after considering the standards specified in section 1460 (b) of this title, and approved under State or local law after public hearing) and for the demolition of such buildings and structures if, pursuant to such urban renewal or development plan, the land is to be cleared and redeveloped, and for the relocation of occupants from buildings and structures to be demolished or rehabilitated, as certified by such institution or hospital to the local public agency and approved by the Secre-

tary, shall be a local grant-in-aid in connection with such urban renewal project: *Provided,* That no such expenditure shall be eligible as a local grant-in-aid in any case where the property involved is acquired by such educational institution or hospital from a local public agency which, in connection with its acquisition or disposition of such property, has received, or contracted to receive, a capital grant pursuant to this subchapter: *Provided further,* That no such expenditure shall be deemed ineligible as a local grant-in-aid in connection with an urban renewal project, to the extent that the expenditure is otherwise eligible, if the facilities, land, buildings, or structures with respect to which the expenditure is made are located within one mile of the project.

Expenditures by educational institutions and hospitals; eligibility as a local grant-in-aid

"(b) No expenditure made by any educational institution or hospital, as provided in subsection (a) of this section shall be deemed ineligible as a local grant-in-aid (1) in connection with any urban renewal project if made not more than seven years prior to the authorization by the Secretary of a contract for a loan or capital grant for such project, or (2) in connection with any such project for which the Secretary, prior to September 25, 1963, has authorized a loan or capital grant contract if made not more than five years prior to the submission of an application for financial assistance under this subchapter for such urban renewal project.

Aggregate expenditures by public authority deemed a local grant in-aid

"(c) The aggregate expenditures made by the public authority, established by any State, for acquisition, demolition and relocation in connection with land, buildings, and structures acquired by such public authority and leased to an educational institution for educational uses or to a hospital for hospital uses shall be deemed a local grant-in-aid to the same extent as if such expenditures had been made directly by such educational institution or hospital.

Definitions

"(d) As used in this section—

(1) the term 'educational institution' means any educational institution of higher learning, including any public educational institution or any private educational institution, no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(2) The term 'hospital' means any hospital licensed by the State in which such hospital is located, including any public hospital or any nonprofit hospital, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

The taking of a true slum or blighted area is in itself a public purpose and 42 U.S.C. Sec. 1463 specifically provides that a taking also for use by an "educational institution" is for the public welfare.

In 1964 the U. S. District Court for the Western District of Michigan recognized this congressional inference when it stated, "hospital care provided by public, private, and private sectarian nonprofit institutions is a public use clothed with an overriding public interest. . . ." *Ellis* v. *City of Grand Rapids,* 257 F. Supp. 564, 573, 574 (W.D. Mich. 1964) (with numerous citations therein).

Generally, it has been held that redevelopment of slum areas is a proper subject for eminent domain since the acquisition and clearing of blighted areas serves a public

purpose even though incidental to this is a subsequent transfer of property to private parties. *Housing and Redevelopment Authority of City of St. Paul* v. *Greenman,* 255 Minn. 396, 96 N. W. 2d 673 (1959).

Absent the federal agency as a party, this Court is without jurisdiction to conclude that there has been an unlawful "taking" in deprivation of plaintiffs' asserted federal constitutional rights. The proper time for plaintiffs to challenge the conduct of the defendants would be when and if the properties of plaintiffs are condemned and attempted to be "taken" under the eminent domain powers of the defendants.

The alleged conduct by defendants which constitutes an alleged denial of equal protection of the laws does not meet a standard which would justify immediate intervention by a federal tribunal. See *Norwalk Core* v. *Norwalk Redevelopment Agency,* 395 F. 2d 920 (2nd Cir. 1968). In *Norwalk* there was alleged discrimination on account of race by local authorities in carrying out their contractual obligations to provide adequate relocation facilities for displaced persons.)

There is no evidence in this record that shows that any federal laws secured any rights in these individual plaintiffs, which rights were allegedly transgressed upon by the defendants. Any failure by a local housing authority to comply with the requirements of HUD's *Urban Renewal Manual* should result in a denial of approval of the loan and grant application by the officials of HUD. The property owner cannot assert that he can enforce the federal requirements as a third-party beneficiary of the contract between HUD and the local authority.

> "The federal courts have consistently held that those not parties to the contract have no standing to enforce conditions imposed on redevelopment agencies by the United States, although those suing would benefit from such enforcement. Gart v. Cole, 263 F. 2d 244 (2d Cir., 1959); Allied City Wide, Inc. v. Cole, 97 U. S. App. D. C. 277, 230 F. 2d 827 (1956); cf. Pittsburgh Hotels Association v. Urban Redevelopment Authority of Pittsburgh, 309 F. 2d 186 (3rd Cir., 1962)." *Johnson* v. *Redevelopment Agency of City of Oakland, California,* 317 F. 2d 872, 874 (9th Cir. 1963).

Plaintiffs' final assertion of jurisdiction existing in this Court is grounded on Rule 57 of the Federal Rules of Civil Procedure, i.e., Declaratory Judgments Act, 28 U.S.C. Rule 57. This rule of procedure delineates the procedure for obtaining a declaratory judgment pursuant to 28 U.S.C. Sec. 2201, which provides:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

These statutes do not vest jurisdiction in the federal courts; instead, they provide a form of remedy which can be attained in a federal forum which has jurisdiction over the particular case or controversy.

> "(T)he Declaratory Judgments Act does not itself grant any jurisdiction to the federal courts which they do not otherwise possess." *Savini* v. *Sheriff of Nassau County,* 209 F. Supp. 946, 950 (E.D. N.Y. 1962).

For the aforementioned reasons, this Court is without jurisdiction over the matter in controversy.

Defendants' motion for dismissal grounded on lack of jurisdiction is sustained. An appropriate order will be entered.

/s/ W. Clure Morton
United States District Judge

ORDER

(Filed September 30, 1971)

In accordance with the Memorandum Opinion heretofore entered in these matters, it is hereby ORDERED that the above-captioned cases be and the same are hereby dimissed.

/s/ W. Clure Morton
United States District Judge

Nos. 72-1141-42

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 72-1141

R. L. Gardner and
Ruth Gardner,
Plaintiffs-Appellants

v.

The Nashville Housing Authority of the Metropolitan Government of Nashville and Davidson County, Tennessee; Jack D. Herrington, Secretary and Executive Director; and The Vanderbilt University,
Defendants-Appellees

No. 72-1142

Charles H. Adair and
June P. Adair,
Plaintiffs-Appellants,

v.

The Nashville Housing Authority of the Metropolitan Government of Nashville and Davidson County, Tennessee; Jack D. Herrington, Secretary and Executive Director; and The Vanderbilt University,
Defendants-Appellees

Appeal from the United States District Court, Middle District of Tennessee, at Nashville.

Decided and Filed October 18, 1972.

Before Edwards, and McCree, Circuit Judges, and Tuttle, Senior Circuit Judge.*

*Honorable Elbert Parr Tuttle, Senior Circuit Judge, Fifth Circuit, sitting by designation.

TUTTLE, Senior Circuit Judge. This appeal resembles, in the legal points at issues, that in *Boles* v. *Greenville Housing Authority*, 6th Cir. ____ F. 2d ____, No. 72-1087, decided this day. It requires the same disposition.

This case arose from an attack by two sets of plaintiffs, each set being a husband and wife, on the proposed taking of their property, located within the University Center Urban Renewal Area by the defendants, Nashville Housing Authority and Vanderbilt University (alleged to have conspired with Nashville Housing Authority).

It is unnecessary to recite all of the grounds of the complaint because we find ourselves in full agreement with the statement of the trial court.

> "The Department of Housing and Urban Development is the authority of the government of the United States which determines that a local area qualifies for federal urban renewal funds. The local housing authority gathers the necessary criteria and formulates the requisite plans to ascertain whether submitting an application to the federal authorities would be appropriate; then the local governing body must adopt and approve the plan in order to demonstrate community sanction for the proposed project. Upon receipt of the application for loan and grant funds, HUD is required to determine if the project qualifies under the applicable federal requirements.
>
> This Court recognizes that a local urban renewal plan must comply with the requirements of the federal *Urban Renewal Manual,* but the determination of compliance is solely the responsibility of HUD. Any arbitrary or capricious decision by HUD which affronts the terms of the manual may be subject to adjudication and review in a federal forum, but it is necessary that such an attack be directed against HUD as a party-defendant. *See Powelton Civil Home Owners Association* v. *Department of Housing and Urban Development,* 284 F. Supp. 809, 827-28 (E.D. Pa. 1968)."

In this case the trial court determined that the United States District Court did not have subject matter jurisdiction because of the non-joinder of the Secretary of the Department of Housing and Urban Development. We held in the *Greeneville* case that subject matter jurisdiction was established, but that the case should not have proceeded without HUD as an indispensable party. The effect is the same, so far as concerns the propriety of our reaching the merits of the appeal. However, we do conclude that, with proper parties before the court this is a suit that can be filed in the United States court under 28 USCA § 1331. Whatever proceedings were undertaken by the Nashville Housing Authority depended for their vitality and financing on federal statutes 42 USCA § 1441, et seq. We think this is clearly a case of federal question jurisdiction.

However, as noted in the *Greeneville* case, *supra,* the statute which creates federal court jurisdiction, also makes HUD, the federal agency created to exercise the statutory powers, an indispensable party defendant when the legality of HUD's action under the statute is challenged.

The appeal is DISMISSED and the case is REMANDED to the trial court for entry of an order vacating its judgment of dismissal, provided the plaintiffs elect within a reasonable time, to be determined by the trial court, to move to join the proper representatives of the Department of Housing and Urban Development as defendants.

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CHARLES H. ADAIR and
JUNE P. ADAIR,
Plaintiffs,

v.

NASHVILLE HOUSING AUTHORITY,
Et Al.,
Defendants.

Civil Action No. 5686

R. L. GARDNER and
RUTH GARDNER,
Plaintiffs,

v.

NASHVILLE HOUSING AUTHORITY,
Et Al.,
Defendants.

Civil Action No. 6021

OPINION

This suit was originally brought on the 26th day of March, 1970, by property owners in the University Center Urban Renewal Project area (hereinafter referred to as "Tennessee R-51") located in Nashville, Tennessee. The present defendants are the Nashville Housing Authority (hereinafter referred to as "NHA"), Jack Herrington, Secretary and Executive Director of NHA, The Vanderbilt University and the Secretary of the United States Department of Housing and Urban Renewal (HUD). The suit was not brought as a class action.

The cases were tried together before District Judge L. Clure Morton, who, on September 30, 1971, issued a memorandum opinion and order containing findings of fact and conclusions of law on all issues favorable to the defendants. Then, however, Judge Morton dismissed the cases for want of a federal question because HUD was not then a party defendant.

On appeal, the United States Circuit Court of Appeals of the Sixth Circuit (468 F. 2d 480) agreed with Judge Morton's rationale but remanded the cases to give the plaintiffs an opportunity to join HUD as a party defendant. This was done. Judge Morton then recused himself and the Honorable Daniel H. Thomas, Senior District Judge for the Southern District of Alabama, was designated to hear the cases. In the remanded case the parties have stipulated that the entire record in this cause, including the testimony at the previous hearing, may be considered by the Court. It was further stipulated that the testimony of a HUD witness could be introduced in behalf of HUD and that plaintiffs would have the opportunity to rebut the HUD testimony. All additional testimony was submitted to this Court upon evidentiary depositions, and the entire record in this cause has been considered by this Court in rendering this Opinion.

The Urban Renewal Project Tennessee R-51 was conceived and implemented under the Federal Urban Renewal Act known as Sction 112, which is codified in 42 USC 1463. This statute provides that where an area surrounding an education or hospital facility is a slum or is blighted and such area has been declared by the local government to be an urban renewal project, that such project, if it meets certain Federal standards, will then qualify for Federal funding.

The attacks made upon Project Tennessee R-41 by the plaintiffs are set forth in a stipulation of issues which was incorporated as follows:

"1. Whether the defendant, The Nashville Housing Authority, and the individual defendant Gimre (Defendant Herrington's predecessor) in his capacity as the Secretary and Executive Director of the Nashville Housing Authority committed a clear and obvious abuse of power in the exercise of their duties under Section 1460, Title 42, USCA, in relation to the adoption of the University Center Urban Renewal Project by Metropolitan Government of Nashville and Davidson County, and what is the scope of review by this Court of the actions of the said defendants in relation to the adoption of said project and the effect of any such abuse on the validity of the project.

2. Whether the defendant, The Vanderbilt University, as part of a conspiracy with defendant Nashville Housing Authority and with Metropolitan Government, deliberately permitted property owned by Vanderbilt in the Project area, which met the standards under the housing codes to deteriorate to substandard housing in order to qualify the area as a blighted or substandard area; and if so, the effect of such conspiracy on the validity of the Project.

3. Whether officials of the defendant, The Vanderbilt University, and the defendant, The Nashville Housing Authority, participated in a conflict of interest in violation of Section 13-910 TCA, which renders void the Project.

4. Whether plaintiffs, Adair and Gardner, in the process of qualifying the Project, were denied hearings before the Nashville Housing Authority, and whether such hearings are required under Section 10 of the Federal Administrative Procedures Act.

5. Whether Section 1463 of Title 42 of the U. S. Code s constitutional as violative of the due process clause

of the Fourteenth Amendment of the Constitution of the United States in its application to the right of the defendant the Nashville Housing Authority, to condemn the property of the plaintiffs for the Urban Renewal Project.

6. Whether the plaintiffs, Adair and Gardner, have standing to raise and try the above issues in this Court."

The relief originally sought by the Plaintiffs was as follows:

(1) to enjoin the defendants from initiating eminent domain proceedings for the purpose of acquiring plaintiff's property and to recover damages for the amount of diminution in value of plaintiff's property;

(2) to be entitled to a declaratory judgment of their respective rights pursuant to Rule 57 of the Federal Rules of Civil Procedure, and an adjudication that 42 U.S.C., Section 1463, is unconstitutional.

Additional issues raised on the remand to this Court were: (1) whether there were arbitrary or capricious actions by HUD officials in the implementation of HUD responsibilities in regard to the project; and (2) whether since the plaintiffs did not bring this suit until the project was well on its way toward completion (the initial inclusion of the plaintiffs' property in an urban renewal area having been declared by the Nashville City Council in 1961) the actions are barred by laches.

The background and history of the Project Tennessee R-51 were set forth in detail in the opinion by Judge Morton. This Court adopts that part of Judge Morton's opinion and will not repeat the background and history of this opinion.

Although the scope of review by this Court of the actions of the Nashville Metropolitan Council[1] and the actions of the HUD officials is narrow and limited, as hereinafter discussed, the nature of this case demands a complete review of the entire record, and therefore I have gone beyond this narrow and limited scope of review, and have made factual findings based upon the weight of the evidence.

Before setting forth findings of fact and conclusions of law, it is necessary that the Court state the nature of an urban renewal project involved. The type project under consideration here is a creature of the State and local government. The local legislative body (in this case the Nashville Metropolitan Council) must first designate and establish the urban renewal area in accordance with the statutes of the State of Tennessee. Then under applicable Federal statutes, the Secretary of the Department of Housing and Urban Development and his subordinates must determine whether the particular project qualifies for Federal Participation in its funding. Two-thirds of the area covered by the Project was a "rehabilitation area" (wherein all structures, houses and other improvements were required to be brought up to "standards" by their owners) and the remaining one-third of the area adjacent to the Vanderbilt campus was designated a "clearance area" (wherein all of the land was to be acquired by Vanderbilt, all structures removed and the entire area redeveloped by the University). The qualification requirements of the two segments of the Project are different as hereinafter explained.

The findings of fact and conclusions of law by the Court under the issues before it are:

[1]Nashville changed its form of government in 1963 to The Metropolitan Government of Nashville and Davidson County.

FINDINGS OF FACT

Whether the project, Tennessee R-51, is in fact a slum blighted and/or deteriorated area within the meaning of the Federal and State urban renewal laws and regulations?[2]

1. There is a strong preponderance of evidence supporting the determination that the area within the Project is a slum and blighted area so as to qualify for urban renewal treatment within the definitions set forth in T.C.9. 13-801, et seq. Particularly, the area meets the definition of a slum and blighted area as set forth in Section 13-813 T.C.A.; and therefore the actions of the Nashville Metropolitan Council in constituting the area an urban renewal project were lawful and in accordance with the statutes of the State of Tennessee.

2. A strong preponderance of evidence supports the determination that the Project area also qualifies for Federal funding as "an urban renewal area" in that it meets the requirements of the Housing Act of 1949, as amended, 42 USC 1463.[3] The area also meets the requirements of the HUD Urban Renewal Manual in that at least twenty percent of the buildings in the area contain one or more building deficiencies and the area itself contains at least two environmental deficiencies. The environmental deficiencies existent in the area are: (a) inadequate street layout; (b) incompatible uses or land use relationships; (c) over-crowding of buildings on the land and (d) exces-

[2]Some of the issues have been modified and consolidated to conform to the issues on which the case was actually tried.

[3]The definition of a slum or blighted area for Federal funding purposes is set forth in 42 USC Sec. 1460(a) as follows:

> " 'Urban renewal area' means a slum area or a blighted, deteriorated, or deteriorating area in the locality involved which the Secretary approved as appropriate for an urban renewal project."

sive dwelling unit densities and (e) inadequate and antiquated sewer and other utilities in the area.

3. The area adjacent to the Vanderbilt University qualifies for funding for clearance treatment under the provisions of the Housing Act and under the requirements of the HUD Urban Renewal Manual. In the clearance area there are at least twenty percent of the buildings in structural condition that warrant clearance. There are an additional number of buildings in the clearance area to total at least fifty percent of the total buildings, which because of their blighting influence also warrant clearance.

4. When the Metropolitan Council on August 15, 1967, adopted its Ordinance 67-278, declaring the total area an urban renewal project, there were 39.8 percent of buildings in the required under the HUD Manual for qualifying the Project area for Federal funding.

5. In the clearance area, there were in the summer of 1967, 54.5 percent of the buildings warranting clearance either as a consequence of being structurally sub-standard (28.4%) or containing blighting influences (26.1%), thereby qualifying that area for clearance treatment within the meaning of the Urban Renewal Manual.

6. The clear preponderance of evidence supporting the qualification of the areas for urban renewal and clearance treatment under Tennessee statutes, the Housing Act of 1949 and the various provisions of the HUD Manual is from testimony of well qualified engineers, both independent and members of the staff of NHA and HUD. The evidence introduced on behalf of the plaintiffs, though completely sincere, is for the most part by persons without engineering qualifications. The officials of NHA and HUD made a thorough and repeated study as to the qualifications of the area. At several junctures during the history of this Project when complaints were made by the plaintiffs or other property owners, the subject matter of their com-

plaints were carefully considered and, as it appears to the Court, were handled in a competent and courteous manner.

7. Although to sustain the project the Court need only find that the actions of the Nashville Metropolitan Council and HUD in forming and funding the project were not arbitrary, capricious or a palpable abuse of discretion, the Court finds, in fact, that the project area, and the clearance area therein, constituted lawful urban renewal areas under both State and Federal requirements.

> *Whether the actions of the officials of NHA and HUD and the action of the Metropolitan Council were so baseless, acting in accuracy and fact or the officials so lacking in knowledge, that the decisions of these officials were arbitrary, capricious and in bad faith?*

8. The Court's findings in regard to this charge are incorporated in Findings 1 through 8, but it should be added here that because of the protests of the plaintiffs and others not only did the HUD officials review the findings of NHA and the Metropolitan Council to determine their reasonableness, but also the HUD staff taking special interest in the project, examined the area independently, and made an independent determination that the area qualifies for Federal funding and, also, that the clearance area met the requirements of the HUD manual.

9. The Court therefore finds that the decisions of the officials of HUD, NHA and The Metropolitan Council were not arbitrary, capricious or in bad faith, but, on the contrary, these decisions were in accordance with the applicable legal requirements and the clear preponderance of evidence.

Whether the plaintiffs Adair and Gardner were denied opportunities to inspect the project area plans, surveys, records, etc. with the result that they were denied "hearings" before the Housing Authority and such hearings as might be required by the Statutes of Tennessee and Federal Housing Act?

10. Tennessee law (T.C.A. Section 13-815) requires a public hearing prior to approval of an urban renewal project by the local government. The Housing Act of 1949, 42 USC 1455, requires that if an urban renewal project is to be Federally funded a public hearing must be held before land is acquired.

11. The record is without dispute that the plaintiffs and other property owners attended a public hearing sponsored by the Nashville Housing Authority within the project area on November 4, 1965. Again on July 19, 1967, at the time the final plans for the project were formulated, another public hearing was held in the Project area which was attended by the plaintiffs and other property owners. Then on August 7, 1967, the Nashville Metropolitan Council held a public hearing in the Municipal Auditorium of Nashville which was attended by between 350 and 500 people. At all of the public hearings the project was explained by officials of the Nashville Housing Authority, and the advisability of the project was discussed and debated. At the public hearing before the Metropolitan Council, practically all of the challenges to the project raised in this suit were argued before the Council by the plaintiffs and by one of the District Councilmen, after which on August 15, 1967, the Council voted 30 to 4 in favor of Ordinance 67-278 approving the project.

12. Prior to these public hearings reasonable notice was given, the hearings were well attended and residents who had questions or protests were heard.

13. A project site office was opened within the project area in 1965. Maps and plans were kept in this office and were open for public inspection. The record discloses that the plaintiffs Adair and other property owners frequently visited this office and were given such information as was available. Detailed computations concerning the rating given the different structures in the area were available prior to the adoption of the Ordinance by the Metropolitan Council and in fact the validity of such ratings was questioned and debated before the Council on much the same charges of irregularity as are made here. In addition, the plaintiffs Adair and other property owners were granted requests to appear before the Board of Commissioners of NHA to register their protests prior to NHA's recommendations being forwarded to the Nashville Metropolitan Council. Then after the adoption of the project by the Nashville Metropolitan Council the plaintiffs Adair were given a hearing by HUD officials prior to HUD's agreeing to fund the project. The evidence indicated that these were "fair and meaningful hearings".

14. The Court finds that the plaintiffs were not denied access to the project area plans, surveys, records and ratings on the structures involved. The public hearings held, and particularly the hearing of August 7, 1967, before the Metropolitan Council complied with Title 42 USC, Section 1455(d) and T.C.A. 13-815.

Whether a conspiracy existed between or among the defendants Vanderbilt University and Nashville Housing Authority and Nashville Metropolitan Government under which the conspirators determined to take the plaintiffs' property in violation of their individual rights, due process of law, equal protection of law and in order to qualify the area as a blighted area?

15. The charges of conspiracy by the plaintiffs are that Vanderbilt purchased property in the area and allowed it

to deteriorate in order to qualify the area as a blighted area; that the Housing Authority retained an engineering firm to survey the project area, which had also been employed to assist the University in its campus planning and the general charge that the University originally conceived the idea of the urban renewal project and unlawfully influenced the local government to adopt the project for the private benefit of the University. There is no evidence of any such conspiracy among officials of Vanderbilt University, the Nashville Housing Authority and Metropolitan Government of Nashville.

16. There is no evidence that Vanderbilt accumulated property in the project area and allowed it to deteriorate in order to cause the area to qualify. On the contrary, the evidence demonstrates a consistent pattern by the University of demolishing houses which were not suitable for continued occupancy. Between 1962 and 1967, the University demolished 98 structures out of a total of approximately 250 structures which the University owned. When the question of continued demolition arose in 1965 HUD officials advised Vanderbilt to continue its demolition program as the area would continue to qualify even if these University owned houses were removed.

17. The engineering firm of Clark and Rapuano was retained by Vanderbilt in the late 1950's to assist the University in formulating its master plan for future expansion. In 1961 NHA retained the same firm to conduct inspection surveys and gather information for the determination of whether the proposed project met urban renewal requirements. There is no evidence that the engineering firm exhibited a bias in favor of the desires of the University nor that the firm deliberately carried out its inspection surveys with a purpose of achieving the requisite qualifying percentages.

18. In answer to the charge that the urban renewal project was conceived and implemented for the sole private benefit of Vanderbilt, the evidence shows that the University began its own plan to acquire property in the clearance area in 1956 and at the time the land was approved by the Nashville Metropolitan Council, the University already owned more than one-half of the tracts of land in the clearance area. Judge Morton succinctly described the original purpose of the project as follows:

> "At its inception, the University Center Urban Renewal Project included the Hillsboro Village shopping area, the Music Row area and the university and hospital complexes. When the plan was approved by the Nashville City Council in August, 1961, it was foreseen as a project which would be of benefit to the entire Nashville community. Vanderbilt was to benefit, as were the other universities in the area and the music industry and economic interests which were located in the area. The project was to provide a vehicle for orderly expansion, reduce traffic problems, and provide minimal costs for improving utilities and sewers in the area".

Whether officials of the defendant, The Vanderbilt University, and the defendant, The Nashville Housing Authority, participated in a conflict of interest in violation of Section 13-910 TCA, which renders void the Project?

19. There is no evidence to sustain the contention of the plaintiffs that the project is voided because of a conflict of interests in violation of Section 13-910 T.C.A. Without question, officers of two of the major banks in Nashville were also trustees of Vanderbilt University. Other officers of these banks were, during part of the approximately ten year span over which this project was developed, members

of the Board of Commissioners of the Nashville Housing Authority. The Chancellor of Vanderbilt University was for a period of this time, a member of the Regional Federal Reserve Board. There is not the slightest bit of evidence that any of these individuals were, in their public capacities, at any time motivated by any purpose other than serving the interests of the community. The Court reiterates the excerpt from Judge Morton's opinion as follows:

> "This Court does not believe that members of the banking community must withdraw themselves from community involvement in order to avoid being burdened with individual responsibilities which arise from participation in community activities rather than from their employment responsibilities. The evidence did not disclose anything which would be suspect of or tainted with self-interest on the part of any of these individuals or institutions. Instead, there was substantial evidence of a dedication to public purpose and public responsibility on the part of each person individually, and each institution separately involved. As to the individuals, the evidence affirmed the importance and the standard of quality of their individual efforts which they contributed to the betterment of the Nashville community."

20. There is no evidence that either of these Commissioners had a "personal pecuniary interest" involved in their decision-making position as Commissioners of the Nashville Housing Authority.

CONCLUSIONS OF LAW

1. In 1959, Congress passed an amendment to the Federal Urban Renewal Act known as Section 112 which is codified in 42 USC 1463. The specific purpose of this statute was to provide Federal funding for qualified urban renewal projects in the neighborhood of universities and hospitals.

It appears to the Court that Project Tennessee R-51 is of the particular sort for which this statute was enacted.

2. Section 112 of the Housing Act of 1949, 42 USC 1463, meets the constitutional challenge. The fact that Vanderbilt University shares the benefits of the project with the Nashville community, and participates in the implementation of the project, does not render the project invalid.

> "Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. See Luxton v. North River Bridge Co. (U.S.) supra; cf. Highland v. Russell Car & Snow Plow Co., 279 U. S. 253, 73 L. Ed. 688, 49 S. Ct. 314. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."
>
> *Berman* v. *Parker,* 348 U. S. 26, at 33-34.

3. The constitutionality of 42 U.S.C. 1463 has been passed upon directly in *Ellis* v. *The City of Grand Rapids,* 257 F. Supp. 564 (W.D. Mich. 1966) where the Court dealt with an urban renewal project in the vicinity of a hospital and sustained the constitutionality of the statute even though the hospital participated as a redeveloper of the project area. This Court, agreeing with Judge Morton and agreeing with *Ellis,* again sustains the constitutionality of 42 U.S.C. 1463.

4. The question of what constitutes a slum or blighted area is a legislative question, political in nature and involving questions of public policy. *Berman* v. *Parker,* supra; *In Rem Bunker Hill Urban Renewal Project,* 389 Pac. 2d 538 (Cal. 1964); *Berggran v. Moore,* 392 Pac. 2d 522 (Cal. 1964); *Apostle* v. *City of Seattle,* 422 Pac. 2d 289 (Wash. 1966); *Harper* v. *Trenton Housing Authority,* 274 S. W. 2d 635, 645 (Tenn. 1954); *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Finance Agency,* 310 F. 2d 99, 105 (7th Cir. 1962); 40 Am. Jur. 2d Housing Laws, Section 19, pp. 1075-76.

5. The role of the judiciary in reviewing a legislative determination that a particular area is a slum or blighted area suitable for urban renewal treatment is narrow. The Court will not substitute its judgment for the judgment of the legislative body unless there is a showing that such determination was arbitrary and capricious constituting a clear and palpable abuse of its legislative responsibilities. In this case all presumptions are in favor of the validity of the exercise of the judgment of the municipal council. *Berman* v. *Parker,* supra; *Runnels* v. *Staunton Redevelopment and Housing Authority,* 149 S. E. 2d 882 (Va. 1966); *Harper* v. *Trenton Housing Authority,* supra; *Apostle* v. *City of Seattle,* supra; *Star* v. *The Nashville Housing Authority,* 145 F. Supp. 498 (M. D. Tenn. 1956).

6. The judicial review of federal agency action is limited to much the same scope of review as legislative action. Thus the Administrative Procedures Act Title 5 U.S.C., Section 706, provides that the reviewing Court may only hold the action of a federal agency unlawful if such action is deemed arbitrary, capricious or abusive of discretion or otherwise not in accordance with law. In this case the Court finds that the actions of HUD officials in regard to the Project Tennessee R-51 were not arbitrary or capricious or an abuse of discretion, but were in accordance with the

legal requirements for the establishment of an urban renewal project and were in accordance with the facts existent at the time of such actions.

7. In the present case, not only do the facts not justify judicial intervention, but on the contrary, clearly confirm the legislative determination by the Municipal Council of Nashville and the agency action by HUD officials that the area within Project Tennessee R-51, needed and deserved urban renewal treatment within the definitions set forth in applicable statutes and regulations.

8. While undoubtedly there existed within the urban renewal area some houses that were habitable and serviceable, and indeed beautiful and attractive, Congress and the Legislature of Tennessee have authorized an attack on the problem of blighted areas in a community on an area basis rather than on a structure-by-structure basis. As this Court stated in *Star* v. *Nashville Housing Authority,* supra, citing *Berman* v. *Parker:*

> "A redevelopment agency must approach the problem of the blighted parts of the community on an area, rather than on a structure basis, and it is immaterial that some particular structure within such area may be safe, sound and well-kept."

9. At common law in order to establish an unlawful conflict of interest it is necessary that the public official have conflicting "pecuniary" interests, 63 *C.J.S. Municipal Corporations,* Section 988. This project became legally operative when approved by the Metropolitan Council and funded by the HUD officials. While there is no conflict of interest shown on the part of the Commissioners of the Nashville Housing Authority, there is none alleged against the parties who gave life to the project.

10. Under the charge of conspiracy, plaintiffs have made the bare assertion that the University allowed its

property in the clearance area to deteriorate in order to qualify that area. While the clear preponderance of evidence contradicts the plaintiffs' assertion there is no obligation on the part of a redeveloper to maintain its properties in an urban renewal area in a better state than the properties of other owners. *Kimberline* v. *The Planning Board of Camden,* 73 N. J. Super. 80, 178 A. 2d 678, at 681 and 684.

> "The allegation of plaintiffs that Rutgers contrived to bring this area to the blighted state was unsupported by evidence. The use of many of these residential properties which were purchased by Rutgers for purposes other than residential is not proof of plaintiffs' contention. And furthermore, the fact that the present owners, Rutgers, or other persons, have not seen fit to continually restore these properties does not affect the determination, nor is it proof of any design on the part of either Rutgers, or such persons, to contribute to the blight. Rutgers has used these properties for the best use to meet their needs. It would not be economically feasible for it to act otherwise. . . . the fact that a redeveloper was available prior to the municipal determination and has now entered into an agreement with the housing authority can lead only to the conclusion that such is the exercise of sound judgment. There is no evidence of any wrongful conduct on the part of Rutgers, or its representatives." *Kimberline,* 73 N. J. Super. 80, 178 A. 2d 678, at 681 and 684.

11. Defendants HUD and Vanderbilt, citing *Costello* v. *United States,* 365 U. S. 265, 282 (1960) and *Landell* v. *Northern Pacific R.R. Company,* 122 F. Supp. 253 (D.C. D.C. 1954), affirmed 223 F. 2d 316, Cert. den. 350 U. S. 905, have made the affirmative defense of laches in that for approximately nine years plaintiffs did not bring suit after they admittedly had notice of the 1961 action of the Nashville City Council declaring the area a slum and blighted area, and during this time HUD and Vanderbilt each spent approximately ten million dollars in the development and implementation of the project. While elements of this affirmative defense are present, it is unnecessary for the Court to reach a conclusion on this question in view of its other conclusions.

12. The issue of standing of the plaintiffs to maintain this suit and the issue of subject matter jurisdiction were settled by the Court of Appeals, provided HUD can be made a party defendant, which has been done.

The Court finds that the suits of the plaintiffs should be DISMISSED. Order to be entered accordingly.

This the 4th day of March, 1974.

/s/ Daniel H. Thomas

United States District Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CHARLES H. ADAIR and
JUNE P. ADAIR, - *Plaintiffs,*

v.

NASHVILLE HOUSING AUTHORITY,
Et Al, - - *Defendants.*

Civil Action No. 5686

R. L. GARDNER and
RUTH GARDNER - *Plaintiffs,*

v.

NASHVILLE HOUSING AUTHORITY,
Et Al, - - *Defendants.*

Civil Action No. 6021

ORDER

In accordance with the Findings of Fact and Conclusions of Law this date entered in the above causes, it is ORDERED, ADJUDGED and DECREED that plaintiff's suits are hereby DISMISSED with prejudice. No costs to be taxed.

DONE this the 4th day of March 1974.

/s/ Daniel H. Thomas
United States District Judge

Nos. 74-1687-88

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

R. L. Gardner and
Ruth Gardner,
Plaintiffs-Appellants,

v.

The Nashville Housing Authority of the Metropolitan Government of Nashville and Davidson County, Tennessee; Jack D. Herrington, Secretary and Executive Director; Vanderbilt University; and United States Department of Housing and Urban Development,
Defendants-Appellees.

Charles H. Adair and
June P. Adair,
Plaintiffs-Appellants,

v.

The Nashville Housing Authority of the Metropolitan Government of Nashville and Davidson County; Tennessee; Jack D. Herrington, Secretary and Executive Director; Vanderbilt University; and United States Department of Housing and Urban Development,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division

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Decided and Filed April 10, 1975.

Before: Edwards, McCree and Miller, Circuit Judges.

Per Curiam: This is the second appeal involved in this litigation (See Gardner v. Nashville Housing Authority, 468 F. 2d 480 (6th Cir. 1972)). At the first hearing United States District Judge Morton had dismissed the complaints in these two cases because plaintiffs had failed to join the United States Department of Housing and Urban Development (HUD). This court agreed that HUD was a necessary party for federal question jurisdiction under 28 U.S.C., Sec. 1331 (1970), but vacated judgment so that plaintiffs could amend to join the essential federal department as a party.

After the amendment and the joining of HUD, the case was assigned for further hearing to the Honorable Daniel H. Thomas, Senior Judge for the Southern District of Alabama, sitting by designation.

At the second hearing the parties stipulated that the entire record, including all of the evidence at the previous hearing, should be considered by Judge Thomas, and additional evidence was introduced by HUD and by plaintiffs. On March 4, 1974, Judge Thomas entered a careful and thorough opinion, including findings of fact and conclusions of law, which led him to dismiss plaintiffs' complaints on the merits. —— F. Supp. —— (M.D. Tenn. 1974).

This court has now reviewed the briefs, the records of these two proceedings, and Judge Thomas's opinion. We can find no basis for holding any of his findings of fact to be clearly erroneous. In this regard we refer specifically, although not exclusively, to his findings 1 through 7. Nor do we perceive any error in the District Judge's legal conclusions.

While we recognize the sincerity of the plaintiffs and we understand their intense desire to be allowed to keep the two residential properties which they own, it is clear to us

that the statutory plan involved in Congress' adoption of Section 112 of the Housing Act of 1949, as amended (42 USC Sec. 1463 (1970)), was intended to serve areawide purposes of removing the effects of slums and housing blight. Inevitably such a scheme had to contemplate the acquisition of some standard housing which, as of the acquisition date, was still serving its owners' interests very well. The constitutionality of urban redevelopment planning by combined federal and local government action (including participation therein by private enterprise) has long ago been unheld by the Supreme Court in *Berman* v. *Parker,* 348 U. S. 26 (1954) and by this court in *Woodland Market Realty Co.* v. *City of Cleveland,* 426 F. 2d 955 (6th Cir. 1970) and *Gibson & Perin Co.* v. *City of Cincinnati,* 480 F. 2d 936 (6th Cir.), *Cert. denied,* 414 U. S. 1068 (1973).

We recognize that these last two cases denied relief to property owners outside of redevelopment areas who were complaining about the impact of the redevelopment on their properties, whereas our instant plaintiffs' property is directly subject to acquisition under the redevelopment plan. The holdings of the *Berman, Woodland* and *Gibson & Perin* cases appear to us to apply with even greater force to the constitutional claims of the appellants.

Further, like the District Judge, we have found in this record no abuse of procedural due process and no arbitrary and capricious actions on the part of either the federal or the local agencies. It seems to us, as it obviously did to Judge Thomas, that Nashville in general and these plaintiffs in particular have known the purpose of this plan for at least ten years.

We have, however, given special attention to plaintiffs' claims 1) that the redevelopment plan involved in this particular proceeding was the product of an illegal conspiracy between Vanderbilt University and the Nashville Housing Authority, and 2) that two of the members

of the Nashville Housing Authority should have been barred from participating in decision making by conflicts of interest.

As to the conspiracy charge, the District Judge did not find, the plaintiffs have not pointed out, and we have not discovered in the record any evidence at all of illegal purpose or conspiratorial combination. Many of Nashville's leaders in both civic and educational affairs were involved in the planning and decision making concerning this project. Doubtless they knew each other and doubtless, too, they exhibited friendly concern for the interests of Vanderbilt University. For that matter, it is obvious that Congress did likewise when it adopted Section 112 of the Housing Act of 1949, as amended, (42 U.S.C., Sec. 1463 (1970)).

In short, we find nothing more in the record than that many public officials have cooperated toward completion of a statutorily authorized project deemed by the local government to be of great civic benefit.

The assertion of conflict of interest is similarly unsupported in this record. Conflict of interest is a phrase which may be given many meanings. Generally, however, when it is used to suggest disqualification of a public official for performing his sworn duty, it refers to a clash between the public interest and the private pecuniary interest of the individual concerned. Here no such clash is presented. On the contrary, we are asked to deduce that because the Chancellor of Vanderbilt was a member of the Board of Directors of the Federal Reserve Bank at Atlanta, he thereby controlled the public decision making of two members of the Nashville Housing Authority who in their private lives were officers of two separate Nashville Banks. There is not a line of testimony that suggests that any such influence or control existed or was ever attempted or even hinted at. We arrive at the same conclusion concerning the claim that these same two Nashville Housing Authority

Board members were officers of banks and thus under the control of two other fellow bank officers who were also members of the Vanderbilt Board of Trust.

We have considered appellants' argument that these relationships violated T.C.A. sec. 13-910 (1973). Inspection of that statute discloses no prohibition which deals remotely with the facts of this case. Appellants' reliance upon *Wilson* v. *Iowa City,* 165 N. W. 2d 813 (Iowa 1969), has led us to read the case with care. In the *Iowa City* case six city councilment who voted for resolutions authorization the urban renewal condemnation plan themselves owned property or interests in property which would be subject to acquisition. Another councilman was a full time paid executive of the University of Iowa which was very much in favor of the redevelopment plan. The Iowa Supreme Court held that all seven council members had conflicts of interest which voided the council's actions.

As we have noted, no such facts are present in the instant case and, of course, we are not bound by the dicta in the opinion.

We do not feel that we need to discuss the appellate issues of this case further in view of Judge Thomas' comprehensive opinion which we have reviewed with care and hereby adopt.

The judgment of the District Court is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

R. L. Gardner and
Ruth Gardner - - - - - *Plaintiffs-Appellants,*

v.

The Nashville Housing Authority of the Metropolitan Government of Nashville and Davidson County, Tennessee;
Jack D. Herrington, Secretary and Executive Director;
The Vanderbilt University; and
United States Department of Housing and Urban Development - - - *Defendants-Appellees.*

Charles H. Adair and
June P. Adair - - - - - *Plaintiffs-Appellants,*

v.

The Nashville Housing Authority of the Metropolitan Government of Nashville and Davidson County, Tennessee;
Jack D. Herrington, Secretary and Executive Director;
The Vanderbilt University; and
United States Department of Housing and Urban Development - - - *Defendants-Appellees.*

ORDER—Filed June 18, 1975

Before: Edwards, McCree and Miller, Circuit Judges.

A motion for rehearing having been filed in the above-styled case; and

On consideration it being the judgment of the court that no issue is presented therein which had not been previously considered,

Said motion for rehearing is hereby denied.

Entered by order of the Court
John P. Hehman, Clerk
By (s) Grace Keller
Chief Deputy

Supreme Court, U. S.
FILED
OCT 7 1975

In the Supreme Court of the United States

No. 75-259

R. L. GARDNER and RUTH GARDNER, *Petitioners,*

vs.

THE NASHVILLE HOUSING AUTHORITY OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; JACK D. HERRINGTON, Secretary and Executive Director; THE VANDERBILT UNIVERSITY; and UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *Respondents.*

CHARLES H. ADAIR and JUNE P. ADAIR, *Petitioners,*

vs.

THE NASHVILLE HOUSING AUTHORITY OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; JACK D. HERRINGTON, Secretary and Executive Director; THE VANDERBILT UNIVERSITY; and UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT BRIEF FOR RESPONDENTS THE VANDERBILT UNIVERSITY AND METROPOLITAN DEVELOPMENT AND HOUSING AGENCY AND JACK D. HERRINGTON IN OPPOSITION

(Names of Counsel on Inside Front Cover)

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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In the Supreme Court of the United States

No. 75-259

R. L. GARDNER and RUTH GARDNER, *Petitioners,*

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THE NASHVILLE HOUSING AUTHORITY OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; JACK D. HERRINGTON, Secretary and Executive Director; THE VANDERBILT UNIVERSITY; and UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *Respondents.*

CHARLES H. ADAIR and JUNE P. ADAIR, *Petitioners,*

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THE NASHVILLE HOUSING AUTHORITY OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; JACK D. HERRINGTON, Secretary and Executive Director; THE VANDERBILT UNIVERSITY; and UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OPINIONS BELOW

The various opinions of the lower courts, all unreported, are set forth in the Appendix to the Petition.

JURISDICTION

The jurisdictional requirements for review by this Court are adequately presented by the Petition.

QUESTIONS PRESENTED

Respondents respectfully submit that there are only two questions presented in the Petition for Certiorari which should be considered by this Court. These two questions are numbered III and IV in the Petition for Certiorari and may be stated as follows:

I

Whether the hearings afforded Petitioners pursuant to the requirements of 42 U.S.C.A. Section 1455(d) and other applicable provisions of the federal urban renewal laws were in compliance with the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

II

Whether 42 U.S.C.A. Section 1463, as applied to Tennessee R-51, is unconstitutional and in violation of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

The remaining two questions presented by the Petition are inappropriately presented inasmuch as they do not involve issues which are properly the subject of review through Petition for Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to 42 U.S.C.A. Section 1455(d) and 42 U.S.C.A. Section 1463(a) which are set forth in the Petition at pages 4-6, the Petition should have included Section 1 of the Fourteenth Amendment to the United States Constitution.

United States Constitution Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

STATEMENT

This litigation involves the validity of Tennessee R-51, a conventional urban renewal project undertaken and implemented as a joint project between the Nashville Housing Authority (now the Metropolitan Development and Housing Agency or "MDHA") and several private redevelopers pursuant to the authority granted under Tennessee state law and federal law embodied principally in 42 U.S.C.A. Section 1463 and related sections of the federal urban renewal laws.

In 1961, the City Council of the City of Nashville (later the Metropolitan Government of Nashville and Davidson County) made a preliminary determination that the proposed project area designated as Tennessee R-51 was a slum, blighted and deteriorating area. Based upon this

determination, the federal government allocated funds to make a planning study of the project area to determine its feasibility as an urban renewal project. From 1962 through 1965 studies of the area were made by the engineering firm of Clark & Rapuano, Inc. of New York City. In addition to studying street patterns, storm drains, water, sewer and other utilities in the area, the firm considered the quality of the structures within the area on a structure-by-structure inspection. The structural survey included an exterior survey which was confirmed by a 10% random sampling interior inspection.

As originally conceived, the project area encompassed a much greater geographical area than was ultimately approved by the Metropolitan Council in August of 1967 and submitted to the Department of Housing and Urban Development (HUD) for approval of federal funding. The original project involved several major private redevelopers including The Vanderbilt University, Peabody College, Scarritt College and St. Thomas Hospital. When finally approved by the Metropolitan Council, The Vanderbilt University ("Vanderbilt") and St. Thomas Hospital remained as private redevelopers in the area and land would be available for other public and private redevelopment. Contrary to statements by Petitioner the acquisition area was only the Vanderbilt University expansion area, the record shows the acquisition area included parcels for streets, schools, parks, utilities and other redevelopment. In 1970 St. Thomas requested and was given permission by the local and federal agencies to be allowed to withdraw from the project.

Following the planning stages, the final project plan was submitted to the Metropolitan Council by the MDHA for first reading on August 1, 1967. Immediately prior to this submission, the plan was reviewed by the engineering firm which determined that the area qualified under federal regulations for federal funding and was also a slum and blighted area within the meaning of Tennessee law. Upon approval of the Plan, the Metropolitan Council passed Ordinance No. 67-278 which adopted the findings of the Nashville Housing Authority and its consultants that the University Center Urban Renewal Area, Phase I, constituted a "slum, blighted and/or deteriorated area" within the technical definitions established under state and federal urban renewal laws and regulations. On March 20, 1968, Tennessee R-51 was finally approved for federal funding by HUD, and an allocation order was issued and funding began. On March 26, 1970 Petitioners filed suit in the United States District Court for the Middle District of Tennessee seeking to halt the project. Defendants in the initial lawsuit were the Nashville Housing Authority (later MDHA), Vanderbilt and various individuals who served on the Board of the Nashville Housing Authority and as employees of the agency. The federal agency was not made a defendant in the original action. Petitioners based their lawsuit upon the following basic contentions, all of which were denied by Respondents: (1) alleged conflicts of interest for members of the Board of the Nashville Housing Authority who approved Tennessee R-51; (2) alleged civil conspiracy between the Nashville Housing Authority, Vanderbilt, and the Metropolitan Government to obtain approval of Tennessee R-51; (3) alleged failure of officials of the Nashville Housing Authority to comply with statutory requirements in approving Tennessee R-51; (4) alleged failure of Respondents to afford Petitioners fair and meaningful hearings upon the proposed project area as required by law; (5) alleged unconstitutionality of 42 U.S.C.A. Section 1463.

After a full trial, the District Judge entered his Memorandum of Opinion on September 30, 1971 (Appendix to Petition at pp. 25-62) which disposed of all issues raised

in favor of Defendants and dismissed the case for lack of subject matter jurisdiction (Appendix to Petition at p. 62). The case was appealed to the Sixth Circuit Court of Appeals which remanded the case with leave to Petitioners to join HUD as an indispensable party. Petitioners refiled their Complaint joining HUD as a Defendant and raised the identical issues previously tried. It was agreed that the record in the subsequent action would become cumulative with proof taken at the previous trial, and all additional proof addressed the two new issues raised: (1) whether there were arbitrary and capricious actions by HUD officials in the implementation of HUD's responsibilities as to Tennessee R-51; (2) whether, since Petitioners did not bring this suit until the project was well on its way to completion, the action was barred by laches. Dealing with each of the issues previously considered by the District Court and the two additional issues raised, the Trial Judge entered his Findings of Fact and Conclusions of Law (Appendix to Petition at pp. 66-83) and found in favor of Respondents on all issues including the issues raised in the previous action; an Order was entered dismissing the case on March 5, 1974 (Appendix to Petition at p. 84). Petitioners appealed to the Sixth Circuit which reviewed the briefs and the records of the two District Court trials and held:

> "We can find no basis for holding any of his [Judge Thomas'] findings of fact to be clearly erroneous. In this regard we refer specifically, although not exclusively, to his findings 1 through 7. Nor do we perceive any error in the District Judge's legal conclusions." (Appendix to Petition at p. 86).

The Court of Appeals adopted the opinion of Judge Thomas and affirmed the judgment. Motion for rehearing in the Court of Appeals in behalf of Petitioners was denied (Appendix to Petition at p. 90).

ARGUMENT

Petitioners have completely aired their position four times to date. They have had two trials on the merits before District Judges, and twice they have raised all the issues before the Court of Appeals. In each instance they have been turned down on the merits. The form of the Petition indicates that they wish to retry this lawsuit before this Honorable Court. It is apparent from the Petition that Petitioners wish to have the entire record presented prior to a determination being made on the Petition. What the Petition fails to acknowledge is that reviewable issues must be presented, and it is apparent in this case that none are present. Likewise, none of the considerations of Rule 19 of the Rules of the Supreme Court is present in this case. There is no conflict between circuits upon any of the issues raised; no decision conflicting with state law is involved; there are no questions (much less, important questions) of federal law which require decision; the decisions in this case are entirely consistent with the precedents of this Court; all the decisions of the lower courts in this case are in accordance with the accepted and usual course of judicial proceedings.

From its outset, this case has involved purely factual issues. In every decision of the lower courts, such factual issues have been categorically resolved in favor of Respondents, and now Petitioners wish to have these matters considered again.

The Petition states with regard to the first question presented for review by it that "the Court of Appeals in the case at bar held *in effect* that overt acts of conflict of interest must be proved before actions of an administrative agency would be set aside by the courts." Petition,

p. 13 (emphasis supplied). In fact, the Court of Appeals found quite simply and explicitly that based upon the facts and circumstances presented no conflict of interest existed. There was nothing implicit in its finding that would give rise to an inference that a new or different standard for the proof of unlawful conflict of interest on the part of public officials was established by the decision. The issue involved a matter of Tennessee law under the Tennessee conflict of interest statute, Tennessee Code Annotated, Section 13-910 (1973), and the Court of Appeals decision, as well as both decisions of the trial judges, found: "Inspection of that statute discloses no prohibition which deals remotely with the facts of this case." (Appendix to Petition at p. 89). If the tenuous circumstances relied upon by Petitioners are sufficient to create an unlawful conflict of interest, it is safe to say that most local boards staffed by public spirited individuals would be unlawfully constituted.

The second question which the Petition purports to raise is likewise a factual question. Petitioners request this Honorable Court to overturn the legislative and administrative determination that Tennessee R-51 was a slum and blighted area qualifying for federal assistance as an urban renewal project. Petitioners would also have this Court inquire into the determinations of the MDHA and HUD officials which authorized the project and approved federal funding.

While it is well-established that legislative determinations are not reviewable in the absence of a clear or palpable or obvious abuse of discretion, both trial judges in this case examined the facts underlying the determination that the project qualified as an urban renewal area, and both found unequivocally that the area did in fact qualify

(See Opinion of Judge Thomas in Appendix to Petition at pp. 71-73). The effect of legislative determinations in the urban renewal context has been discussed widely, and in this case the district court decisions went beyond the maximums required under any standard of review to reach decisions which are clearly supported by the facts of this case. *See, e.g., Berman* v. *Parker,* 348 U.S. 26 (1954); *Harrison-Halsted Comm. Group* v. *HHFA,* 310 F.2d 99 (7th Cir. 1962); *Apostle* v. *City of Seattle,* 422 P.2d 289 (Wash. 1966); *Crawford* v. *Redevelopment Authority,* 211 A.2d 866 (Pa. 1965); *In re Bunker Hill Urban Renewal Project IB,* 389 P.2d 538 (Calif. 1964); *Berggren* v. *Moore,* 392 P.2d 522 (Calif. 1964).

The Petition states that the lower courts determined that the actions of the Metropolitan Council and the local and federal agencies are not subject to judicial review (Petition, p. 17). Such a statement completely disregards the detailed Findings of Fact of both trial judges in which the determinations of all parties as to the qualification of the project area were examined in detail and found to be wholly sufficient. After making a review of the entire record, the Sixth Circuit incorporated the findings of Judge Thomas in its final opinion (Appendix to Petition at p. 89).

Having disposed of the first two questions raised in the Petition, attention is directed to the final two questions as restated herein. It is acknowledged that these two questions are appropriate for consideration upon Petition for Certiorari; however, the Petition should be denied as to each of these questions for the reasons hereinafter stated.

I

Whether the hearings afforded Petitioners pursuant to the requirements of 42 U.S.C.A. Section 1455(d) and other applicable provisions of the federal urban renewal laws were in compliance with the due process requirements of the United States Constitution.

The Findings of Fact of Judge Thomas specifically reviewed the number of hearings which were granted Plaintiffs and found them to be "fair and meaningful" and in compliance with the law. The findings of Judge Thomas were:

> "11. The record is without dispute that the plaintiffs and other property owners attended a public hearing sponsored by the Nashville Housing Authority within the project area on November 4, 1965. Again on July 19, 1967, at the time the final plans for the project were formulated, another public hearing was held in the Project area which was attended by the plaintiffs and other property owners. Then on August 7, 1967, the Nashville Metropolitan Council held a public hearing in the Municipal Auditorium of Nashville which was attended by between 350 and 500 people. At all of the public hearings the project was explained by officials of the Nashville Housing Authority, and the advisability of the project was discussed and debated. At the public hearing before the Metropolitan Council, practically all of the challenges to the project raised in this suit were argued before the Council by the plaintiffs and by one of the District Councilmen, after which on August 15, 1967, the Council voted 30 to 4 in favor of Ordinance 67-278 approving the project.

> 12. Prior to these public hearings reasonable notice was given, the hearings were well attended and residents who had questions or protests were heard.
>
> 13. A project site office was opened within the project area in 1965. Maps and plans were kept in this office and were open for public inspection. The record discloses that the plaintiffs Adair and other property owners frequently visited this office and were given such information as was available. Detailed computations concerning the rating given the different structures in the area were available prior to the adoption of the Ordinance by the Metropolitan Council and in fact the validity of such ratings was questioned and debated before the Council on much the same charges of irregularity as are made here. In addition, the plaintiffs Adair and other property owners were granted requests to appear before the Board of Commissioners of NHA to register their protests prior to NHA's recommendations being forwarded to the Nashville Metropolitan Council. Then after the adoption of the project by the Nashville Metropolitan Council the plaintiffs Adair were given a hearing by HUD officials prior to HUD's agreeing to fund the project. The evidence indicated that these were 'fair and meaningful hearings'.
>
> 14. The Court finds that the plaintiffs were not denied access to the project area plans, surveys, records and ratings on the structures involved. The public hearings held, and particularly the hearing on August 7, 1967, before the Metropolitan Council complied with Title 42 USC, Section 1455(d) and T.C.A. 13-815."

Petitioners request this Honorable Court to reexamine the record to determine if the facts warrant the findings

of all the lower courts that the requirements of due process were amply satisfied. The record shows that prior to the adoption of the plan, the Adair Petitioners were represented by counsel James F. Neal, a former U. S. Attorney, and were successful in getting one of their properties deleted from the acquisition program. The record shows that not only was due process amply satisfied, these Petitioners received every accommodation at both the local and federal level.

Petitioners are apparently requesting this Court to step into the shoes of the executive and promulgate regulations for compliance with the requirements of 42 U.S.C.A. Section 1455(d). It is well settled that this Court does not give advisory rulings. The only issue is whether the rights of Petitioners were violated, and the records show such was not the case. Petitioners assert on page 18 of the Petition that their challenges to the hearing procedure were "dismissed by the Court of Appeals with the statement that it found 'no procedural due process,'" an apparent misquote. To the contrary, the Sixth Circuit found *upon examination of the entire record*, that Petitioners were accorded the full benefits of due process of law:

> "Further, like the District Judge, we have found in this record no abuse of procedural due process and no arbitrary and capricious actions on the part of either the federal or the local agencies. It seems to us, as it obviously did to Judge Thomas, that Nashville in general and these plaintiffs in particular have known the purpose of this plan for at least ten years." (Appendix to Petition at p. 87).

The decisions of the trial judges and the Sixth Circuit are correct, and the facts involved in this issue should not be retried.

II

Whether 42 U.S.C.A. Section 1463, as applied to Tennessee R-51, is unconstitutional and in violation of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

The urban renewal statute under which Tennessee R-51 has received federal funding, 42 U.S.C.A. Section 1463, provides that private educational institutions, such as colleges and universities and hospitals, may participate in duly approved urban renewal projects. Generally, such participation includes allowing the municipality to receive "credit" toward federal appropriations for expenditures made by the private institution. The private institution may be allowed to develop all or part of a project area. The statute requires that the Project be approved under state and local law after public hearing, and it must then be approved by HUD.

The constitutionality of 42 U.S.C.A. Section 1463 has been passed upon only one time directly in reported decisions. In *Ellis* v. *City of Grand Rapids*, 257 F. Supp. 564 (W.D. Mich. 1966), even though a private hospital was involved in the project, much as Vanderbilt University is participating in the project before this Court, the court stated:

> "We hold that participation by a private sectarian hospital as a redeveloper in an urban renewal project is not unconstitutional." 257 F. Supp. at 570.

The *Ellis* case raised and resolved many of the same issues which are before this Court. As to the community benefit to be derived from the Project, the court found:

> "The position of St. Mary's Hospital would have as a redeveloper is exactly the same as that of any other

redeveloper. On the other hand, because of the credits which St. Mary's Hospital has accumulated under Section 112 of the Housing Act, 42 U.S.C.A. Section 1463, the cost of the project as far as the city is concerned, will be considerably less. Whatever St. Mary's Hospital has paid for land and buildings will be credited to the City's share of the project cost, which in turn, determines the federal allotment. Thus, the more St. Mary's Hospital has paid, the less the City will pay, and the less the City of Grand Rapids pays, the more the United States Government pays." 257 F. Supp. at 570.

And further, the court went on to say:

"[I]t is obvious that the private uses which will finally be involved after a redevelopment project has been implemented are of an incidental or ancillary character, and that of paramount importance is the established public purpose of beautification and redevelopment. Once this primary purpose has been established, it is generally irrelevant what incidental or secondary purposes are involved. The possibility that plaintiff's or any person's property in the area may subsequently be sold to St. Mary's Hospital is inconsequential." 257 F. Supp. at 571.

Any determination of the constitutionality of a provision such as 42 U.S.C.A. Section 1463 must begin and end with the landmark decision of this Court in *Berman* v. *Parker*, 348 U.S. 26, 75 S.Ct. 78, 99 L.Ed. 27 (1954), which was relied upon by the court in *Ellis*. In *Berman* v. *Parker*, the constitutionality of the Redevelopment Act passed by Congress for Washington, D.C., was challenged. The statute gave preference to private enterprise over public agencies in executing the redevelopment plan. The statute

was held to be constitutional even though the project involved redevelopment by private enterprise. The Court noted that great weight must be given to legislative determinations in this area:

"Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia [citations omitted] or the states legislating concerning local affairs. [citation omitted] This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." [citations omitted] 348 U.S. at 32.

Petitioners would have this Court believe that Tennessee R-51 is distinguishable from the situation in *Berman* v. *Parker*, *supra*, because, Petitioners allege Tennessee R-51 was motivated solely by private Vanderbilt University interests. All the evidence as well as the findings of both Trial Judges and the Sixth Circuit is contrary to Petitioners' position.

The Project was in no way conceived or developed solely for the use of Vanderbilt University. The Project was from its inception a community project designed to benefit the entire Nashville community. As Judge Morton determined in the first hearing of this matter:

"At its inception, the University Center Urban Renewal Project included the Hillsboro Village shopping area, the Music Row area and the University and hospital complexes. When the plan was approved by the

Nashville City Council in August, 1961, it was foreseen as *a project which would be of benefit to the entire Nashville community.* Vanderbilt was to benefit, as were the other universities in the area and the music industry and economic interests which were located in the area. The Project was to provide a vehicle for orderly expansion, reduced traffic problems, and provide minimal cost for improving utilities and sewers in the area." (Appendix to Petition at p. 46) (Emphasis supplied).

In view of the foregoing determination, it cannot seriously be contended that Tennessee R-51 was developed solely for the private benefit of Vanderbilt University. The Court in *Berman* v. *Parker* found:

"In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them." 348 U.S. at 33.

The Court in *Berman* v. *Parker* recognized the pervasive influence which was necessary for an effective urban renewal project:

"In the present case, Congress and its authorized agencies attacked the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis. That, too, is opposed by appellants. They maintain that since their building does not imperil health or safety nor contribute to the making of a slum or blighted area, it cannot be swept into a redevelopment plan by the mere dictum of the Planning Commission or the Commissioners. The particular uses to be made of the land in the Project were determined with regard to the needs of the particular community. The experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were unsanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns. It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented.

* * *

If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building." 348 U.S. at 34-35.

On the basis of *Berman* v. *Parker* and *Ellis* v. *City of Grand Rapids*, and the factual determinations outlined above, it is respectfully submitted that the constitutionality of 42 U.S.C.A. Section 1463 and its application in Tennessee R-51 is indisputable. There is no justifiable basis upon which the decision of *Berman* v. *Parker* should be reconsidered.

CONCLUSION

Based upon the foregoing Statement and Argument, it is respectfully submitted that the Petition filed herein should be denied.

Respectfully submitted,

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SUPREME COURT, U.S.
FILED
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No. 75-259

In the Supreme Court of the United States

OCTOBER TERM, 1975

R. L. GARDNER, ET AL., PETITIONERS
v.
THE NASHVILLE HOUSING AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners contend that the designation of the area in which they own residential property as an urban renewal area was invalid, because of an alleged conflict of interest and the alleged inadequacy of the prior hearings, and that the statute under which federal funding of the urban renewal project was authorized denies due process because it allegedly permits condemnation of property for nonpublic purposes.

Section 112 of the Housing Act of 1949, as amended, 42 U.S.C. 1463, provides that when an educational institution or hospital is located in or near a slum or blighted area, and the local municipal government determines that an urban renewal project in such area

would promote the public welfare and the proper development of the community, the project may be eligible for federal grants-in-aid if certain federal standards are met; land in such an urban renewal area may be made available to such educational institution or hospital for redevelopment in accordance with the use specified in the urban renewal plan. In August 1961, the Nashville, Tennessee City Council [1] designated an area of that city as a slum or blighted area for the purpose of the Act. It also requested that the Department of Housing and Urban Development (HUD) advance funds, pursuant to 42 U.S.C. 1452, to finance a survey to determine whether that area would qualify as an urban renewal area under applicable federal and state statutes and regulations. The area included the campuses of Vanderbilt University, Peabody College, and Scarritt College.

HUD advanced the funds for the survey, which was conducted by an urban planning firm, employed by the Nashville Housing Authority ("NHA"). This survey indicated that the area was blighted and deteriorating and that all conditions necessary for federal funding of an urban renewal project could be met.

A project site office was opened within the urban renewal area; its maps and plans of the proposed project were available for public inspection. On November 4, 1965, NHA sponsored a public hearing to acquaint the community with the proposed project.

[1] In 1963 Nashville changed its form of government to the Metropolitan Government of Nashville and Davidson County.

A second community-oriented NHA-sponsored meeting was held on July 19, 1967, to discuss the final plan for the project. Petitioners and other homeowners attended both meetings.

The final project report was submitted to the Nashville Metropolitan Council for approval on August 1, 1967.[2] Six days thereafter the Council held a public hearing, attended by approximately 350 to 500 persons, at which all aspects of the urban renewal project were debated.

After spirited discussion, the Council adopted the project report and the recommendations of NHA, concluding that the project area constituted a "slum, blighted and/or deteriorated area" within the meaning of both state and federal urban renewal laws and regulations (Pet. App., p. 49). An application for a loan and grant-in-aid contract was thereafter submitted to HUD. The application was approved on March 20, 1968 (Pet. App., p. 30).

Two years later, on March 26, 1970, petitioners, owners of residential property in the proposed urban renewal clearance area,[3] brought suit in federal district court seeking to enjoin NHA's eminent domain pro-

[2] A housing authority in Tennessee must gain the approval of the governing body of its respective city or town before an urban renewal project may be initiated. T.C.A. 13-815 (1973) (Pet. App., pp. 50-52).

[3] Two-thirds of the area covered by the urban renewal project was a rehabilitation area, in which owners of all structures were required to bring their properties up to minimum standards. The remaining one-third of the area was a "clearance area" in which all the land was to be acquired by Vanderbilt University, all structures removed, and the entire area redeveloped by the University (Pet. App., p. 70).

ceedings and to have the federal grant-in-aid legislation, 42 U.S.C. 1463, declared unconstitutional.[4] This action was dismissed for lack of jurisdiction after trial because a necessary party, the Secretary of Housing and Urban Development, had not been joined (Pet. App., pp. 25–62). The court of appeals affirmed that holding but remanded the action to give petitioners an opportunity to join the federal defendant (Pet. App., pp. 63–65).

The remanded case was subsequently heard on a stipulated record. On March 4, 1974 the district court again dismissed petitioners' suit, holding *inter alia,* that 42 U.S.C. 1463 was constitutional; that the actions of the municipal government and HUD in designating the proposed project area a slum and blighted area, within the meaning of the applicable state and federal statutes and regulations, were neither arbitrary nor capricious; that petitioners were afforded an adequate hearing; and that there was no unlawful conflict of interest (Pet. App., pp. 66–83). The court of appeals affirmed *per curiam* (Pet. App., pp. 85–89).

1. Petitioners contend (Pet. 11–14) that various conflicts of interest invalidated the urban renewal project. In particular, they allege that such conflicts arose from the facts that officers of two major Nashville banks were also trustees of Vanderbilt University; that other officers of these banks served as commissioners of the NHA; and that the urban planning

[4] The two suits were initially brought separately but were tried together.

firm retained by NHA in 1961 to conduct the survey of the urban renewal area had been retained by Vanderbilt University in the late 1950s to assist it in formulating a master plan for future expansion. The district court rejected the claims of conflict, finding (1) that there was no evidence that the urban planning firm exhibited a bias in favor of Vanderbilt University or that it conducted its surveys of the urban renewal area with a purpose to qualify it for federal funding (Pet. App., p. 76); (2) that there was "not the slightest bit of evidence that any of these [bank officers] were, in their public capacities, at any time motivated by any purpose other than serving the interests of the community" (Pet. App., p. 78);[5] (3) that there was no indication of self-interested dealings or of "personal pecuniary interest" affecting the propriety of the decisions of the bank officers in their capacities as NHA commissioners (Pet. App., p. 78).[6] The court of appeals specifically

[5] T.C.A. 13-910 (1973) provides in pertinent part: "No commissioner or employee of an authority shall acquire any interest direct or indirect in any housing project or in any property included or planned to be included in any project, nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any housing projects."

[6] As the court of appeals found, the commissioners' lack of personal interest in or ownership of property in the urban renewal area distinguishes this case from *Wilson* v. *Iowa City*, 165 N.W.2d 813 (Iowa Sup. Ct.), upon which petitioners rely. The other cases cited by petitioners do not concern the showing necessary to prove actual bias. They are addressed to the composition of an impartial and disinterested administrative tribunal.

concurred in these findings, stating that petitioners' allegations were unsupported in the record (Pet. App., pp. 88–89).

Both lower courts having concurred in these findings, review of these factual determinations in this Court is foreclosed by petitioners' inability to make a "very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275; *United States* v. *Reliable Transfer Co., Inc.*, No. 74–363, decided May 19, 1975. Petitioners' contentions on this point merely challenge the factual determinations made below and do not warrant review by this Court.

2. Petitioners further assert (Pet. 14–17) that NHA, the Metropolitan Council, and HUD all acted arbitrarily, capriciously, and in bad faith in declaring the project area to be a slum or blighted area for purposes of the Act. The district court correctly rejected this argument (Pet. App., pp. 80–81), finding that these agencies acted in accordance with the legal requirements for the establishment of an urban renewal program. It therefore refused to substitute its judgment for that of the agencies.

Tennessee law defines a blighted area as one detrimental to the safety, health, morals, or welfare of the community by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use, or obsolete layout. T.C.A. 13–813 (1973). The HUD Urban Renewal Manual requires that in order to qualify for federal funding, at least 20 percent of the buildings in a proposed urban renewal area must contain one or more building deficiencies and that the area itself must contain at least two environmental defects (Pet. App., p. 28). The trial court held that the facts adduced before it supported the administrative agencies' determination that the structural unsoundness of the housing stock and environmental deficiencies existing in the project situs satisfied the criteria for classification as a slum and blighted area (Pet. App., pp. 80–81).[7] Accordingly, it sustained that determination. The court of appeals affirmed this ruling (Pet. App., p. 87). The essentially factual question whether the administrative decisions were supported by substantial evidence does not warrant further review.

3. Petitioners' contention (Pet. 18–21) that they were denied a fair hearing in connection with the designation of the urban renewal area as deteriorated and blighted is similarly contradicted by the evidence adduced in the trial court.

The function of the various governmental agencies in determining that the project area satisfied the criteria for urban renewal funding was quasi-legislative in nature, involving the resolution of fac-

[7] The district court noted that the evidence introduced by the defendants to support their finding of blight took the form of testimony from well-qualified independent engineers and members of the staffs of NHA and HUD, but that the evidence introduced by the petitioners originated for the most part with persons without engineering qualifications (Pet. App., p. 72).

tual questions of general applicability. See Davis, *Administrative Law,* ch. 13 (5th ed. 1973). It is the nature of the fact-finder's process, not the ultimate effect of its decision on petitioners, that determines their right to an adjudicatory hearing. *Powelton Civic Home Owners Association* v. *Department of Housing and Urban Development,* 284 F. Supp. 809, 829–830 (E.D. Pa.). Due process does not require a trial-type hearing, with the right to cross-examine witnesses, in these circumstances. Nor would such a hearing be feasible, given the number of homeowners affected by an urban renewal program.

Petitioners were afforded ample opportunities to comment and introduce evidence. Tennessee law provides that a public hearing must be held prior to approval by a local government of an urban renewal project. T.C.A. 13–815 (1973). The Housing Act of 1949 requires that if an urban renewal project is to be federally funded, a public hearing must be held before land is acquired. 42 U.S.C. 1455(d). As both lower courts found, these requirements were met in the instant case.

Moreover, petitioners attended the NHA-sponsored public hearings on the urban renewal project, held on November 4, 1965, and July 19, 1967, as well as the public Nashville Metropolitan Council meeting of August 7, 1967.[8] The project was thoroughly debated

[8] The record further discloses that petitioners frequently visited the urban renewal project site office and were given such information as was available. (Pet. App., p. 75).

at these meetings (Pet. App., p. 74). Indeed, petitioners raised before the Metropolitan Council practically all the objections to the project that they made in the district court (Pet. App., p. 74). Petitioners Adair and other property owners also were granted the opportunity to appear before the NHA Board of Commissioners before the plan was forwarded to the Nashville Metropolitan Council. After its adoption of the program, petitioners Adair and other property owners were given a further hearing by HUD officials prior to HUD's agreeing to fund the project (Pet. App., p. 75).[9]

Petitioners contention that they were unconstitutionally deprived of their right to a hearing was therefore properly rejected by the courts below.

4. Finally, petitioners argue (Pet. 21–23) that the operation of 42 U.S.C. 1463 in this case denies due process of law because the property is to be taken primarily for the private use and benefit of Vanderbilt University and only incidentally for public use.

The role of the judiciary in determining whether Congress is exercising the police power for a public purpose is a very narrow one; once the court determines that the object of the program is within

[9] Under well-established principles, petitioners had no right to an adjudicatory hearing before the Secretary. *South East Chicago Com'n* v. *Department of Housing and Urban Development,* 488 F. 2d 1119 (C.A. 7); *Shannon* v. *Department of Housing and Urban Development,* 436 F. 2d 809 (C.A. 3). Petitioners' reliance on *Appalachian Power Co.* v. *Environmental Protection Agency,* 477 F. 2d 495 (C.A. 4), is misplaced because the eminent domain action here was area-wide, not individual in impact, and did not require an adjudicatory hearing before final administrative action. See *id.* at 500–501.

Congress' authority, its right to realize that end through the use of eminent domain is clear. *Berman* v. *Parker,* 348 U.S. 26, 32–33. Clearance of blighted areas and slums and reconstruction of those sites has been found to be a valid public purpose. See *Berman* v. *Parker, supra; Harrison-Halsted Community Group* v. *Housing and Home Finance Agency,* 310 F. 2d 99 (C.A. 7), certiorari denied, 373 U.S. 914. The courts below correctly found that in view of the deteriorated quality of the project area, an important public purpose would be served by its reconstruction (Pet. App., pp. 71–73; 86–88). See also *Nashville Housing Authority* v. *City of Nashville,* 192 Tenn. 103, 237 S. W. 2d 946, 949–950.

Once the public purpose of a program has been demonstrated, Congress alone may determine the proper means for its execution. It may conclude that the public well-being may be better served through redevelopment by private enterprise, rather than by a department of government. *Berman* v. *Parker, supra,* 348 U.S. at 33–34. Furthermore, the fostering of institutions of higher learning provides a separate benefit for the public. 42 U.S.C. 1463; see 1959 U.S. Code Cong. & Adm. News 2865 and 1961 U.S. Code and Cong. & Adm. News 1953.

42 U.S.C. 1463 provides for the participation of educational institutions and hospitals in urban renewal programs, and further provides that their expenditures for the acquisition and redevelopment of property within the project area shall be counted as a local grant-in-aid in determining the proper level of federal funding. Under the standards set forth in

Berman, this statute is not unconstitutional. *Ellis* v. *City of Grand Rapids,* 257 F. Supp. 564 (W.D. Mich.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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